REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.
NEW-ORLEANS, FEBRUARY, 1838.

BAILEY & WELLS *vs.* HICKMAN.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE SEVENTH PRESIDING.

Where the clerk's certificate, at the foot of the record, is insufficient to show that it contains all the evidence on which the case was tried, and there is no statement of facts, the court will not inquire into the facts involved. But if the bills of exception enable the court to examine the questions of law which arose during the trial, the appeal will be maintained.

In a possessory action, solely as such, patents or title papers are inadmissible as evidence; but in a mixed action for the recovery of possession, and vindictive damages for a forcible dispossession, they may be read to the jury to explain the motive with which the party acted, and in mitigation of damages.

Where B. & W. sue in a mixed action, to recover possession and damages for a forcible dispossession, and they allege themselves to be in possession

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as joint owners ; join in the claim for damages and these allegations are put in issue by the answer, the court cannot instruct the jury, that if the evidence showed that B. had such possession as would entitle him to a verdict in a possessory action, and there was no evidence in favor of W., they might *find for* B. and against W. This does not accord with the allegations.

If the answers of the plaintiffs, to certain interrogatories of the defendants, on the order of court, were not called for by the interrogatories, they may be disregarded by the jury, under instructions from the court.

This is a mixed action, in which the plaintiffs sue to recover the possession of a tract of land, twenty arpents front, by forty in depth, on the "*Regolets de bon Dieu*," of Red River, in the parish of Natchitoches, to which they allege joint ownership and possession, but that the defendant has taken the possession thereof, and holds the same without title. They pray to have the possession of said tract of land restored to them, together with ten thousand dollars in damages, for the illegal and forcible dispossession of the premises.

The defendant pleaded the general issue, and also the prescription of one year, in support of his possession. He further avers, that he has made valuable improvements worth three thousand dollars, for which he is entitled to be paid in case of eviction. He also sets up title to the *locus in quo*, having purchased from the United States, and avers his possession in good faith, under a title translative of property, and prays to be quieted in his title and possession of the land in controversy.

Upon these pleadings and issues the cause was tried before the court and a jury.

During the trial, several points of law were made, relative to the admission of evidence, and the instructions given by the court to the jury. Bills of exception were taken to the decision of the judge on these controverted points, which are stated in the opinion of this court, which follows.

Upon the whole evidence of the case, and under the instructions of the court, the jury returned a verdict for the plaintiff, Bailey, and against Wells ; and judgment was ren-

dered thereon, decreeing to Bailey the possession of the land described in the petition, with fifty dollars in damages and costs. The defendant appealed.

Dunbar, for the plaintiffs.

This is a possessory action, in which the right and fact of possession was tried by a jury. The verdict and judgment thereon should not be disturbed, being fully supported by the evidence.

2. The appeal should be dismissed for the insufficiency of the clerk's certificate, which does not show that the record contains all the evidence.

Winn, contra, contended, that the court below erred in several matters; and first, in the rejection of the defendant's patents to the land in question, and under which he claims to hold it, which were offered in evidence. This is not merely a possessory action, but one for damages also. He admitted the patents were not admissible as evidence of title merely, but to show the motive of the defendant in entering on the land, and which should at least be received in mitigation of damages. They should have been let go to the jury to show that the defendant was a possessor in good faith, which ought to exonerate him from any claim for damages.

2. The plaintiff's answers to the interrogatories were improper, and ought not to have been allowed to go to the jury. It was, in fact, permitting him to make out his own case. The answers were altogether uncalled for, and improper.

3. The plaintiffs sue as joint owners, and claim possession jointly; therefore, the jury could not legally find in favor of one of them, and against the other, under the pleadings. Judgment was improperly rendered for Bailey, and the suit discontinued as to Wells. It must be for or against both. In this respect the court erred in instructing the jury, and the judgment should be reversed.

Dunbar, in reply. The interrogatories were properly

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answered, as they related to the title papers, and said nothing about them as being owners. It does not appear by the bill of exceptions, for what purpose the patents were attempted to be introduced in evidence; and in this respect the bill of exceptions is clearly defective. It should have stated for what purpose the patents were offered; not having done so, the question of law arising out of the matter cannot be examined.

Bullard, J., delivered the opinion of the court.

In this case, the plaintiffs sue to recover possession of a tract of land, together with damages, for the illegal dispossession by the defendant. They allege, that they had been in possession for many years as joint owners, until they were forcibly dispossessed by the defendants. They lay their damages at ten thousand dollars, for which they claim judgment as well as for restoration to possession.

The defendant denies these allegations, and avers, that he has been in quiet possession for more than twelve months, under a purchase from the United States, and that he holds the land in good faith, and has made valuable improvements. There was a verdict in favor of one of the plaintiffs, and against the other; and from a judgment rendered on said verdict, for the possession of the premises, and for damages assessed by the jury, the defendant has appealed.

Where the clerk's certificate at the foot of the record, is insufficient to show that it contains all the evidence on which the case was tried, and there is no statement of facts, the court will not inquire into the facts involved. But if the bills of exception enable the court to examine the questions of law, which arose during the trial, the appeal will be maintained.

The appellee has moved to dismiss the appeal, on the ground that there is no statement of facts, and that the certificate of the clerk is insufficient to show, that all the evidence upon which the case was tried in the first instance, is now before us. We are of opinion, that the certificate is not sufficient to enable us to inquire into the matters of fact involved in the controversy. But the bill of exceptions in the record enable us to examine the questions of law, which arose during the trial. The appeal is therefore maintained.

From the first bill of exceptions, which has been brought to our notice, it appears, that the defendant offered in evidence, patents for the land in controversy, which were rejected; and his counsel contended, that although as evi-

dence of title, they may have been inadmissible in a possessory action, yet, they ought to have been read to show the motives of the defendant, and in mitigation of damages, in a mixed action like the present. On the other hand, it is urged, that it does not appear from the bill of exceptions, that the patents were offered for any other purpose than to show title. It appears to us, that if the title papers in question, were admissible, for any purpose under the pleadings, they ought to have been read subject to the instruction of the court, that they were to be considered by the jury only for such purpose. So far as the present action is merely possessory, it is clear, the patents could not be used as evidence of title. But the plaintiffs sue for vindictive damages, for a forcible dispossession; and in mitigation of damages, the defendant might well show, that he holds patents for the land; which, although affording no justification for forcibly entering on the premises, yet might tend to explain his motive, and present his acts in a more favorable light to the jury called on to assess the damages. The good faith is expressly alleged in the answer, as well as his possession under the patents. The court, in our opinion, erred.

The next bill relates to the charge of the judge to the jury. They were instructed, that if the evidence showed that Baily had such a possession as would entitle him to a verdict in a possessory action, and there was no evidence in favor of Wells, they might find for Baily, and against Wells.

The plaintiffs in their petition, allege themselves to be in possession as joint owners, and they join in the claim for damages. These allegations are put at issue by the defendant's answer, and that was the issue submitted to the jury. Damages were claimed for the violation of a right claimed jointly by the plaintiffs, and it appears to us the court erred in charging the jury that either could recover without evidence in support of that allegation.

It is unnecessary to inquire whether the court erred in ordering the plaintiffs to answer certain interrogatories annexed to the defendant's answer, because he has not appealed, and because he answered on the orders of the

In a possessory action, solely as such, patents or title papers are inadmissible as evidence; but in a mixed action for the recovery of possession, and vindictive damages for a forcible dispossession, they may be read to the jury, to explain the motive with which the party acted, and in mitigation of damages.

Where B and W sue, in a mixed action, to recover possession and damages for a forcible dispossession, and they allege themselves to be in possession as joint owners; join in the claim for damages, and these allegations are put in issue by the answer, the court cannot instruct the jury, that if the evidence showed that B had such possession as would entitle him to a verdict in a possessory action, and there was no evidence in favor of W, they might *find for* B and against W. This does not accord with the allegations.

If the answers of the plaintiffs to certain inter-

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court ; and if the answers on the part of the plaintiffs were not called for by the interrogatories, they might be disregarded by the jury under the instruction of the court.

rogatories of the defendant, on the order of court, were not called for by the interrogatories, they may be disregarded by the jury, under instructions from the court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, the verdict set aside, and it is further ordered, that the case be remanded for a new trial, with instructions not to reject the patents offered by the defendant, and to abstain from charging the jury as stated in the bill of exceptions above mentioned, and that the appellee pay the costs of the appeal.

GIBSON *vs.* GILL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

Where an appeal appears to be taken solely for delay, the judgment will be affirmed, with such damages, as the court in its discretion may decree, not exceeding ten per cent.

This is an action to recover the sum of one thousand one hundred and eighteen dollars, for the lease of a plantation by the plaintiff to the defendant, for the term of one year, commencing the 1st of January, 1834. When the lease expired, the price remaining unpaid, the plaintiff instituted suit, and sequestered the crop. The defendant excepted to the sequestration, and prayed that it be dissolved and that the suit be dismissed, as having been prematurely brought. He then plead a general denial, and set up a claim against the plaintiff of five hundred dollars, &c.

There is no evidence in the record, but judgment was rendered against the defendant, and after an unsuccessful

attempt to obtain a new trial, on the ground of surprise, he appealed.

Winn, for the plaintiff, prayed that the judgment of the inferior court be affirmed, with ten per cent. damages and costs.

Barry and *Bryce* urged a new trial as prayed for, because the defendant was taken by surprise, and was, consequently, wholly unprepared with his testimony.

Carleton, J., delivered the opinion of the court.

This case comes before us without any statement of facts, bill of exceptions, or any other matter that will enable us to examine it upon its merits.

The appellee, in his answer, insists that the appeal is frivolous and taken merely for delay, and prays that the judgment may be affirmed, with ten per centum damages. *Code of Practice, art.* 907.

Where an appeal appears to be taken solely for delay, the judgment will be affirmed with such damages as the court in its discretion may decree, not exceeding ten per cent.

We think with the appellee's counsel, that the appeal was taken merely for delay; but as the judgment carries five per centum from judicial demand, it appears to us, that five per cent. by way of damages, may well answer the purposes of justice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with five per centum damages on the amount of said judgment, with costs.

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NORMENT, CURATOR, ETC. *vs.* GILL ET UX.

NORMENT ET AL. *vs.* GILL ET UX.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

Where an appeal is evidently taken for delay, and the judgment appealed from carries no interest, it will be affirmed with the maximum of damages allowed by law.

The plaintiff alleges, he is the curator of one James West, deceased, who, in his life time, with one Sharpe, his partner, (now an absentee) built a gin house, etc., for the defendants, worth one thousand dollars, which they refuse to pay, although amicably requested to do so. He prays judgment for said sum.

The defendants pleaded a general denial.

The evidence showed, that Gill admitted he owed plaintiff, and said he would compromise it at three hundred and ninety-three dollars, but never paid any thing.

The cause was submitted to a jury, who returned a verdict of three hundred and ninety-three dollars for the plaintiff, and from judgment rendered thereon, the defendants appealed.

Brewer, for the plaintiff.

Barry and *Bryce, contra.*

Carleton, J., delivered the opinion of the court.

This case also comes before us without statement of facts, bill of exceptions, or other matter enabling the court to revise the judgment rendered in the first instance.

Where an appeal is evidently taken for delay, and the judgment appealed from carries no interest, it will be affirmed with the maximum of damages allowed by law.

The only feature distinguishing it from that of Gibson *vs.* Gill, just decided, is, that in the latter case the judgment of the District Court, carried interest of five per centum from judicial demand, whereas none was allowed on the judgment now under consideration. We think it a proper case for the maximum of damages allowed by law. *Code of Practice, article* 907.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with ten per centum damages on the amount of said judgment, with costs.

VAWTER VS. GILL ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT FOR THE PARISH OF RAPIDES, THE JUDGE OF THE DISTRICT PRESIDING.

Judgment affirmed with five per cent. damages, as it carried five per cent. interest.

This is an action against the maker and endorser of a promissory note for eight hundred and sixty-four dollars, drawn by William H. Gill, and endorsed by the other two defendants in blank. The plaintiff is the holder, and prays judgment for the amount of the note *in solido*, against all the defendants.

The defendants pleaded that the note was given for the price of a negro man, named Bob, sold to Gill, who was so afflicted with redhibitory diseases, studiously concealed from the purchaser, that he is wholly useless, and the consideration of the note has failed so far as greatly to impair the value of the slave. They pray that the suit be dismissed.

There does not appear to be any evidence in the record, on which the case was tried.

There was judgment against the defendants, for the amount of the note sued on, and they appealed.

Winn, for the plaintiff, prayed the affirmance of the judgment, with ten per cent. damages, as for a frivolous appeal.

Barry and *Bryce, contra.*

Carleton, J., delivered the opinion of the court.

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REYNOLD'S CURATOR *vs.* MAHLE.

This case is not distinguishable in principle from that of *Gibson* vs. *Gill*, in which the decree of the court has just been pronounced.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed, with five per centum damages on the amount of the judgment, with costs.

Judgment affirmed with five per cent. damages, as it carried five per cent. interest.

REYNOLD'S CURATOR *vs.* MAHLE.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE DISTRICT PRESIDING.

The Court of Probates for the parish of Rapides, has a clerk, who is necessarily the keeper of its records; and a certificate of the appointment of a curator, must be given and certified from the records by the clerk, to be received as evidence of such appointment. The certificate of the probate judge is insufficient.

Either party has the right to pray for a jury, at any time before the cause is set for trial; and this right cannot be denied, even when it is clear it is intended for delay.

This is an action instituted by Silas Talbert, as curator of the vacant succession of Thomas B. Reynolds, deceased, of the parish of Rapides, against the defendant, in the parish of Natchitoches, for the recovery of one thousand dollars with interest, being the first instalment of the price of one half of an undivided section of land, sold at the probate sale of said succession.

The defendant first excepted to the plaintiff's capacity to sue, on the ground that he was not curator, as set forth in the petition; and upon the trial, the following certificate of the judge of probates for the parish of Rapides, where the

succession of Reynolds was opened, was offered in evidence of the plaintiff's appointment as the curator of said succession.

"The State of Louisiana, Parish of Rapides." "Silas Talbert, Esq., curator of the vacant succession of Thomas B. Reynolds, deceased, having rendered his account of administration, for the previous year, on the eighth day of November, 1836; his administration was, on that day, prolonged for the term of one year, by an order of the Probate Court for the parish of Rapides, on his giving bond with security, in renewal of the security for his faithful administration, and taking the oath required by law; and on which day he filed his bond with sufficient security, and took the oath conformably with said order of the court. Given under my hand and seal of office, as parish judge, in and for the parish of Rapides, this 5th day of May, 1837."

(Signed) "JOHN H. JOHNSON, Parish Judge."

This certificate was objected to as insufficient evidence of curatorship, because the plaintiff should have proved that he had complied with the requisites of the law, in order to make him curator by producing the proceedings, advertisements and bond, &c. The certificate was received by the court, and the defendant's counsel took his bill of exceptions.

At this term of the court, the defendant prayed leave to file an amended answer praying for a jury, which was refused by the court, on the ground, that it would cause delay; the array of the jury being challenged and set aside on account of irregularity in the mode of drawing the *venire*, and there being no jury for the term; the opinion of the court was excepted to.

Judgment was rendered in favor of the plaintiff, for the amount of his claim, and the defendant appealed.

Sherburne, for the plaintiff, insisted, that the judge of probates was competent to give a certificate of the appointment of the curator in this case, and that it was full evidence of such appointment. 3 *Louisiana Reports*, 325.

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2. The jury was asked for, merely for delay; the prayer for trial by jury was not presented until it was known the panel was set aside on a challenge to the array. Under these circumstances, the prayer for a jury came too late, and was correctly refused by the court.

Winn and *Brent*, for the defendant, contended, that the probate judge was not the keeper of the records of the probate court, when a clerk was allowed by law, as is the case in the parish of Rapides. The clerk and not the probate judge, is competent alone to do all clerical acts, and give certified copies from the records of the court.

2. But neither the clerk or judge can give certificates, as to the substance of the records to be read as evidence of what is contained in them. This is but secondary evidence, and is inadmissible. The clerk must give a certified copy of the appointment, to make evidence in this case.

3. The defendant had the right to call for a trial by jury. This right could not be taken from him under any pretence whatever. In this case a jury was asked for before the panel was set aside, and the jury discharged; but the right exists until the cause is set for trial. *Code of Practice*, 494–5. 7 *Martin, N. S.*, 250.

Martin, J., delivered the opinion of the court.

The defendant specially denied the curatorship of the plaintiff. The latter introduced, as evidence of his appointment, a certificate of the judge of probates of the parish of Rapides, stating, that the plaintiff having rendered an account of his administration, for the first year of his curatorship, it had been prolonged for another year, on his giving bond and taking the oath, which he did. A bill of exception was taken to the admission of this certificate in evidence, which was nevertheless received, and the exception overruled.

The Court of Probates for the parish of Rapides, has a clerk, who is necessarily the keeper of its records; and a certificate of the appointment of a curator must be given

It appears to us the certificate was improperly admitted. The Court of Probates for the parish of Rapides, has a clerk who is necessarily the keeper of its records. The appointment of a curator is essentially a matter of record. He can-

not be appointed by parol. Even if the appointment be made at chambers, the order must be filed among the records of the court, and becomes part of them. When a fact which is a matter of record is denied, the trial can only take place by the inspection of the record, if it be the record of the court before whom the question is pending. Otherwise, by the inspection of a copy made and certified by the person who is the keeper of the record.

and certified from the records by the clerk, to be received as evidence of such appointment. — The certificate of the probate judge is insufficient.

Perhaps the best evidence of the appointment of a curator, is the letters of curatorship, which establish not only his appointment, but his compliance with the requisites of the law, by giving bond and taking the oath.

There is also a bill of exception to the refusal of the judge to permit the amendment of the petition by the addition of a prayer for a jury; the judge considering that a challenge to the array had been sustained, and there was no jury in attendance, the prayer for a jury must be viewed as having no other object but delay.

Either party has the right to pray for a jury at any time before the cause is set for trial, and this right cannot be denied, even when it is clear it is intended for delay.

The court in our opinion erred. The Code of Practice authorizes the prayer for a jury at any time before the cause be set down for trial. *Article* 494–5.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the case be remanded for a new trial, with directions to the court below, not to receive the certificate of the parish judge of Rapides, as evidence of curatorship of the plaintiff, and to allow the defendant's prayer for a jury; and that the appellee pay the costs of the appeal.

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BABCOCK, GARDINER & CO. *vs.* WILLIAMS.

BABCOCK ET AL. *vs.* WILLIAMS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

The Supreme Court *held*, in the case of *Licquet's Heirs* vs. *Peirce*, 5 Louisiana Reports, 361, that the supplemental petition of the heirs and legal representatives of a deceased plaintiff, (even after issue joined,) is in the nature of a revival of the action, rather than an amendment; and before the defendant can be ruled to trial, he must be notified by service of the new petition and citation.

Where one of the co-plaintiffs in a joint action, died after issue joined, the suit did not abate as to the others; and an order to revive it in the name of the heirs and legal representatives of the deceased plaintiff being made contradictorily with the defendant: *Held*, that no service of the amended petition, and a citation or notice, on the adverse party, is necessary; nor even judgment by default is required, in order to proceed to final judgment.

This is an action against Williams and others, as the endorsers and maker of a promissory note. The case was before this court at the October term, 1836, holden at Alexandria, and remanded, to allow the heirs and legal representatives of Henry Babcock, one of the plaintiffs, who, it appears, died before judgment in the District Court, to be made parties. See 10 *Louisiana Reports*, 394.

On the return of the case to the inferior court, and on the death of Babcock being suggested, an order was made directing the suit to be revived in the names of his *heirs and legal representatives.* On the same day, the 9th of November, 1836, an amended petition was filed, setting out the names of said heirs, &c., and praying judgment on behalf of the plaintiffs. Upon this being done at the same term, and without any service of the amended petition, or citation on the defendants, the court proceeded to judgment on the evidence offered in the first trial, which being rendered in favor of the plaintiffs, the defendant, Williams, appealed.

Dunbar, for the appellant, assigned for error, on the face of the proceedings, 1st., That the judgment was null, because that since the death of H. Babcock, one of the plaintiffs,

there has been no service of the amended petition of the widow and heirs, on the defendant, nor of citation or notice of the same to him.

2. The defendant has been condemned by default, without having been cited, or judgment taken by default, and that, under these circumstances, no regular judgment could be given against him.

3. This court has already determined, that service of an amended petition and citation, is necessary in cases like this, before the defendant can be required to answer, and be ruled to trial. 5 *Louisiana Reports*, 361.

Winn, contra.

Bullard, J., delivered the opinion of the court.

This case is before us upon an assignment of errors. The errors assigned are, that since the death of Henry Babcock, one of the plaintiffs, there has been no service of the amended petition filed by his widow and heirs, and no citation or notice, and that the defendant has been condemned by default without such service of citation, and that no regular judgment by default was taken against him.

In order to understand the true state of the question, it is necessary to premise, that one of the original plaintiffs died, *pendente lite*, and that the District Court proceeded to judgment, notwithstanding a suggestion of his death, which was brought to its knowledge during the trial. That judgment was reversed by this court, on appeal, and the case remanded in order to enable the legal representatives of the deceased partner to make themselves parties to the suit. Accordingly, they came forward, and the court having previously ordered that the suit be revived in the name of the legal representatives of Henry Babcock, presented themselves in that character, and joined the other plaintiffs in claiming judgment, as prayed for in the original petition. On the following day, a judgment by default was taken ; but it does not appear that any service was made or formal notice of this proceeding. The only question, therefore, is, whether the

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The Supreme Court *held*, in the case of *Licquet's Heirs* vs. *Peirce*, 5 *Louisiana Reports*, 361, that the supplemental petition of the heirs and legal representatives of a deceased plaintiff, (even after issue joined,) is in the nature of a revival of the action, rather than an amendment; and before the defendant can be ruled to trial, he must be notified by service of the new petition and citation.

Where one of the co-plaintiffs in a joint action, died, after issue joined, the suit did not abate as to the others; and an order to revive it in the name of the heirs and legal representatives of the deceased plaintiff, being made contradictorily with the defendant: *Held*, that no service of the amended petition, and a citation or notice on the adverse party is necessary; nor even judgment by default is required, in order to proceed to final judgment.

law requires a new citation in such cases, together with a copy of amended petition, as it has been called in the argument.

In the case of *Licquet's Heirs* vs. *Peirce*, 5 Louisiana Reports, 361, upon which the counsel for the appellant relies, this court held, that the supplemental petition of the heirs and representatives of a deceased plaintiff, forms a revival of the action, rather than an amendment, and before the defendant can be ruled to trial he must be notified by service of the new petition and citation, or by direct and positive notice to his counsel, (if such would suffice,) in order to answer and plead *de novo*, as the case might require.

That appears to have been a case in which there was but one plaintiff. In the one now before us, one of the co-plaintiffs in a joint action, died, and the suit did not certainly abate as to the others. As to the deceased partner, the suit was ordered to be revived in the name of his heirs, and that order was made contradictorily with the defendant. When the heirs, therefore, presented themselves, and assumed that quality on the record, it suffices, in our opinion, that the opposite party had an opportunity to contest their quality. The error in the first case alluded to, consisted in forcing the defendant into a trial without giving them an opportunity to answer the new allegations. In this, the cause appears to have been tried on the original issues, and the same evidence given on the former trial, was admitted by consent of parties. Having consented to go into a trial, without objecting to the capacity of the new parties, it appears to us the defendant ought not now to complain of the proceedings as erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

On the death of one of the co-plaintiffs after issue joined, and an order being made contradictorily with defendants, to revive the suit in the name of the heirs and legal representatives of the deceased plaintiff, so far as his interest was concerned: *Held*, that service of the amended petition and citations, or notice on the defendants, are unnecessary; and no judgment by default is required to be taken.

This is an action by the plaintiffs' suing as a commercial firm, and after issue joined, one of them died. An order was made and the case remanded from this court, with directions to the court below not to proceed to trial, until the representatives of the deceased plaintiff, (Babcock,) should be made parties to the suit. See 10 *Louisiana Reports*, 397.

On the return of the case to the District Court, an amended petition was filed, setting forth the names of the heirs and legal representatives of Babcock, and the court proceeded to final judgment, without any further service of the amended petition, citation or notice to the defendants. Judgment being for the plaintiffs, the defendants appealed and assigned for error, the want of service of the amended petition and citation; and that judgment by default was not taken.

On the death of one of the co-plaintiffs, after issue joined, and an order being made contradictorily with defendants, to revive the suit in the name of the heirs and legal representatives of the deceased plaintiff, so far as his interest was concerned: *Held*, that service of the amended petition and citation, or notice on the defendants, are unnecessary; and no judgment by default is required to be taken.

Dunbar, for the appellants, cited 5 *Louisiana Reports*, 361, in support of this case.

Winn, contra.

Bullard, J., delivered the opinion of the court.

This case cannot be distinguished from that of the same plaintiffs *vs.* Williams, decided at the present term; and for the reasons given in the opinion of the court therein pronounced, the same judgment must follow.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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LECKIE *vs.* CRAIN ET AL.

LECKIE *vs.* CRAIN ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE DISTRICT PRESIDING.

The absence of a witness from the court house, but who is in town, and not in a situation to testify at the time he is called, furnishes sufficient grounds to postpone the trial until the next day, without any other showing by the party wanting his testimony.

The disappointment of a party in being deprived of the testimony he wanted, by the misconduct of a witness at the trial, presents good grounds for a new trial.

This is a petitory action, in which the plaintiff claims title to lot No. 2, in square No. 12, in the town of Alexandria, and alleges that the defendants, Crain and Hunter, have taken possession and set up title thereto. He prays that he be decreed the true owner of said lot, together with all the buildings thereon, and five hundred dollars in damages, and that he have the possession of the same.

The defendants pleaded a general denial, and further averred, that they purchased the lot in question of one R. T. Gibson, whom they call in warranty.

Upon these pleadings and issues the cause was tried before the court and a jury.

In the course of the trial the defendants called as a witness in their behalf, the parish surveyor, who, not answering although in town, the sheriff went after him. He returned soon and reported that the witness was not in a fit state to enter the court house. The counsel of the defendants moved the court for an attachment which was refused, the court being of opinion that the witness was not in a proper state to give evidence.

The counsel for the defendants then moved the court to postpone the further trial of the cause, until morning by which time the witness might be able to give testimony; this being at night when candles were lit, which motion the court also refused, considering that a proper showing ought to have been made before the trial was gone into; to which

opinions of the court the defendants' counsel took a bill of exceptions.

The jury returned a verdict for the plaintiff, giving him the lot and improvements as he claimed, and two hundred and seventy dollars in damages.

The defendants moved for a new trial on several grounds, which was refused, and from judgment rendered, confirming the verdict, they appealed.

Dunbar, for the plaintiff. The verdict and judgment is supported by the evidence, and should be affirmed. There is no other question in this case except what arises on the motion for a new trial. This was properly refused, as there was no legal or proper showing that the witness could not be had, or that due diligence had been used to procure his testimony. It is unnecessary now to remand the cause because the witness is dead, and another trial cannot alter the case.

2. It is as necessary for the party to show by affidavit, in a case like this, that the witness was *not* placed in a condition which prevented him from testifying by his procurement, as to show he was not absent from the same cause.

Winn, for the defendant, insisted, that the evidence and titles produced, did not support the judgment, which, on this ground, ought to be reversed.

2. But the refusal of the judge *a quo* to postpone the trial until the next day, to enable the party to obtain the testimony of his witness, is sufficient ground to remand the cause for a new trial. The law does not require an affidavit to postpone a cause to procure the attendance of a witness, when he has been summoned. *Code of Practice, article* 471.

Martin, J., delivered the opinion of the court.

The defendants pray that this case be remanded for a new trial. It appears that one of the defendants' witnesses being in town during the trial, the sheriff was sent to bring him into court, but returned and reported that the witness was not in a situation to be sworn. On this an attachment

was applied for and refused. It being after candle-light, the counsel for the defendants prayed that the case be adjourned until morning, when it was expected the witness would be in a condition to testify. This was also refused. The trial proceeded, notwithstanding a bill of exceptions was taken to the opinion of the court, refusing the adjournment. A verdict was given against the defendants, who vainly attempted to have it set aside on the ground of surprise, and from judgment rendered thereon, they have appealed.

It is contended, on the part of the appellee, that the District Court did not err, because it was not shown by affidavit, that due diligence had been used, and that the situation of the witness was not occasioned by the procurement of the party, who wanted his testimony. This certainly would have been required if a continuance or postponement of the trial to another term had been asked. In such a case the difference is great, from a request to adjourn a trial from candle-light until the next morning.

It appears to us the appellants used proper diligence. The witness was in town, and they took the proper means to have him brought into court. They could not have been much benefited by the delay, since the trial, most probably, would have terminated before noon the next day.

The absence of a witness from the court house, but who is in town, and not in a situation to testify at the time he is called, furnishes sufficient ground to postpone the trial until the next day, without any other showing by the party wanting his testimony.

It is further urged, that the witness is now dead, and the remanding of the case will not afford the appellants the opportunity of availing themselves of his testimony ; but it will give them the means of procuring the testimony of other witnesses, which may not have been at hand when they discovered the inability of the witness they had relied on. It appears to us upon the whole, that the ends of justice would have been better promoted by granting, than refusing the appellant's request.

The disappointment of a party in being deprived of the testimony he wanted, by the misconduct of a witness at the trial, presents good grounds for a new trial.

The disappointment of the appellants in being deprived of the testimony they wanted, presented a ground for a new trial, which, in our opinion, ought not to have been disregarded.

It is, therefore, ordered, adjudged and decreed, that the

judgment of the District Court be annulled, avoided and reversed; the verdict set aside, and the case remanded for a new trial, the appellee paying the costs of the appeal.

M'DONALD *vs.* LEE'S ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF CONCORDIA.

A note made payable on a particular day, *without defalcation*, is entitled to the usual days of grace, before it is protested for non-payment.

The words "*without defalcation*," in a note, imply that it is to be paid to the holder without any diminution, or claim to set-off, or otherwise, by the maker and endorser.

This is an action on the following promissory note, in which the plaintiff seeks to recover the amount from the endorser's estate.

"$9,677 32. "Rodney, May 5th, 1835.

"On the fifth day of November, 1837, I promise to pay to the order of Charles S. Lee, nine thousand six hundred and seventy-seven 32-100 dollars, *without defalcation*, for value received, payable at the Agricultural Bank, at Natchez, Mississippi. SAMUEL A. MASON."

Endorsed, "CHARLES S. LEL."
"THOS. MCDONALD."

When this note became due it was presented at Bank for payment, and duly protested on the 8th day of November, 1835, for non-payment, and notice thereof given to the endorser.

This suit is instituted against the administrator of the endorser, and the defence is, that payment of the note was not demanded on the 5th of November, when it became due, as it was payable then *without defalcation*; but that three

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days of grace were allowed, contrary to the tenor of the obligation, by which the endorser is discharged.

There was judgment for the plaintiff, and the defendant appealed.

Stacy, for the appellant, contended, that the note sued on, was made payable on a particular day *without defalcation*, and should have been presented for payment, and protested on that day, and notice given to the endorser, in order to make him liable. But the protest shows that a demand was not made on the day the note was absolutely payable, and not until three days after. This delay exonerates the endorser. *Kenner et al.* vs. *their Creditors*, 8 *Martin, N. S.* 36. 7 *Martin*, 460.

O. N. Ogden, contra.

Martin, J., delivered the opinion of the court.

The defendant, administrator of the estate of Charles S. Lee, is appellant from a judgment, by which the plaintiff has recovered the amount of a promissory note, endorsed by Lee, and complains that the judgment is erroneous, because the protest was not made, and notice given to the endorser in due time.

The protest was made at the close of the third day after that mentioned in the note, as the one on which it was made payable. Notice was given immediately after the protest; in other words, the usual days of grace were allowed.

A note made payable on a particular day, *without defalcation*, is entitled to the usual days of grace, before it is protested for non payment.

His counsel has contended, that as the note was expressly promised to be paid *without defalcation*, the protest ought to have been made on the very day stated in the note, and notice given thereof on the following day; and that the expression used, was intended to exclude any postponement or delay of payment, which might otherwise have been claimed.

According to the definition given by Johnson, the word *defalcation* means, "diminution, abatement, excision of any part of a customary allowance." He derives the verb "*defalcate*" from the Latin *defalco*,—"I mow or cut off with a scythe."

The words "*without defalcation,*" in a note imply, that it is to be paid to the holder without any diminution, or claim to set off or otherwise, by the maker and endorser.

On the establishment of banks in the several states of the union, after the peace of 1783, these institutions required the insertion of the words " without defalcation," in notes offered to them, evidently with the view to cause the makers to renounce any claim, by set off or otherwise. The note in this case, is made payable at a bank in Natchez, in the state of Mississippi, and we understand, that by a law of that state, promissory notes are, in the hands of endorsers, subject to set-offs or any other defence, which may be made against the maker, in the same manner as in this state, when endorsed after maturity.

The words " without defalcation," appear in the state of Mississippi, to be intended as precluding the maker of the note, from availing himself of the plea of set off.

According to the construction urged by the appellant's counsel, the words " without defalcation," signify, with the *defalcation or cutting off the days of grace.*

It appears to us the Court of Probates did not err.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

BASS *vs.* BARTON.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CARROLL.

The provisions of article 900 of the Code of Practice, relates to cases in which the appellant seeks to obtain from the judge, a statement of facts, or his signature to bills of exception, and not to applications for time, and a *mandamus* to the judge *a quo* to complete the record.

At any time before or at the argument of the cause, the appellant may obtain further time, and a *mandamus* to the judge *a quo*, to complete and bring up the record. Time is given until the next term, to complete and file the record.

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In this case an appeal was granted, returnable to the October term, 1837, of this court. The record was made out with a certificate, in the name of the probate judge, appended to it, that it "contained a copy of all the documents on file, a transcript of all the proceedings had, and all the testimony adduced in the cause," but the signature of the judge was omitted. This transcript was regularly filed on the 2d October, 1837, being the first day of the term. The court was opened on three several days of this term, but no business done, and it adjourned over to the next year.

Now, on the 2d day of the October term, 1838, an affidavit and motion is filed, praying for an extension of the return day of said appeal, until the 1st Monday in October, 1839, and that a writ of *mandamus*, be awarded to the probate judge of the parish of Carroll, commanding him to make out and certify a true and correct record of the appeal.

Selby, for the defendant and appellee, filed a motion on the 2d day of the October term, 1837, to dismiss this case for want of the certificate of the probate judge, and insisted on its dismissal.

Stacey, for the appellant, contended, that the party had a right at any time before the argument of the cause, to make a motion for time to complete the record; and now moved for a *mandamus* to the probate judge, to complete and sign the certificate at the foot of the record, and for time, until the next term to bring it up and file it. He cited *Code of Practice, article* 898.

Selby, contra.

Bullard, J., delivered the opinion of the court.

The appellee moved the court to dismiss the appeal in this case, by written motion, filed by the clerk on the second day of the last term. That motion was not acted upon, because no business was transacted at that term. On the second day of the present term, the appellant moved for further time to

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bring up the transcript, and for a *mandamus* addressed to the judge, commanding him to certify the record. The defect is apparent, the file of papers purporting to be a transcript, is without the signature of the judge.

This motion on the part of the appellant is opposed, on the ground, that according to article 900 of the Code of Practice, it should have been made on the first day of the term. We are of opinion, that that article relates only to cases in which the party wishing to appeal, seeks the aid of this court, to obtain from the judge a statement of facts, or his signature to bills of exceptions, taken during the trial below, and not to a case like the present, where the only object is to obtain a certified copy of the record and proceedings. Article 898, gives to the appellant a right to have a defect in the transcript corrected, even if the defect should be discovered at the time of the argument. Nothing shows that the defect in this case, is attributable to the fault of the appellant.

The motion to dismiss, is therefore, overruled, and it is ordered, that time be given to the appellant until the next term of the court, to bring up a transcript; and it is further ordered, that a *mandamus* issue, commanding the judge of the Court of Probates for the parish of Carroll, to certify the same according to law.

The provisions of the 900th article of the Code of Practice, relates to cases, in which the appellant seeks to obtain from the judge a statement of facts, or his signature to bills of exception, and not to applications for time, and a mandamus to the judge *aquo* to complete the record.

At any time before or at the argument of the cause, the appellant may obtain further time, and a *mandamus* to the judge *a quo* to complete and bring up the record. Time is given until the next term to complete and file the record.

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APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF RAPIDES.

The declaration made by the notary in a will, that it "was written as dictated by the testator," may as well precede the dispositions as to follow them at the close of the instrument. Either would be sufficient.

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It is sufficient for the validity of a will, that it is signed by another person *for the testator*, in his presence and that of the witnesses, if it is declared that the testator is unable to sign from any physical cause as rheumatism, debility by sickness, &c. The disability may be declared by the notary, without a declaration from the testator.

This is an action of partition, provoked by J. S. Stafford, one of the heirs of Le Roy Stafford, deceased, by a former marriage, against the widow and heirs of the last marriage, in which a partition by licitation of the estate of the deceased is prayed for, contradictorily with the executor under the will, and the said widow and heirs.

The widow set up grounds of nullity against the last will and testament of her late husband: 1. Because, the notary did not write the will as it was dictated.

2. The testator did not sign the said will; nor does the will upon its face show that the testator declared that he knew not how to sign, or that he was unable to sign.

3. Because, express mention is not made in the act, that the will was dictated, and written as dictated; read and signed at one time, without interruption, and without turning aside to other acts.

4. That the said will is void, because, it disposes of effects which were the joint property of this respondent and the testator, and which the testator had no legal right to dispose of by will.

She, therefore, prays, that the said will may be set aside and annulled, and that the executor's authority may be revoked, and a curator appointed to administer said estate, &c.

In an amended answer, the widow, for herself and the heirs by her marriage with the testator, allege for additional nullities in the will.

1. The testator should have signed the instrument himself, or made his mark. One of the witnesses could not sign for him.

2. The testament is not properly dated; the day and year are improperly expressed in figures, when they should have been *written*, &c.

3. There were not the requisite number of witnesses to the will.

4. It has not been regularly probated; in fine, it is not clothed with the formalities of law. She renews her prayer for the annulment of the will, and that a partition be made according to law, &c.

The notary states, that he repaired to the house of Le Roy Stafford, &c., when at his request and at his dictation, the following instrument was written by the notary, and dictated by the said L. S. to be his last will and testament, revoking all former wills and testaments made by him.

The formalities of the will are fully stated and set out in the opinion of this court.

This will was duly admitted to probate. The probate judge decided that the will was good and valid in law as a nuncupative testament by public act. That a partition of the estate of the late L. Stafford take place in conformity to the provisions of said will, between the widow and heirs and legatees, who are parties, and that the said parties be referred to a notary to make such partition accordingly.

From this decree, the widow, for herself and minor children, appealed.

Barry, for the appellant.

Dunbar, contra.

Carleton, J., delivered the opinion of the court.

The controversy in this case is made to turn upon the validity of the nuncupative will of Le Roy Stafford, deceased, made by public act, which the defendants allege to be void, for various causes of nullity. Two only of which, it becomes necessary for us to notice:

1st. Because, the notary did not write the will as it was dictated by the testator.

2d. Because, the testator did not sign the will, nor does it upon its face show, that the testator declared he knew not how, or was not able to sign. The judge of the Court of Probates thought the will good and valid in law, and decreed accordingly. The defendants appealed.

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The commencement of the will is in the following words:

"State of Louisiana, Parish of Rapides.

"Be it known, that I, W. B. Pearce, notary public, in and for the parish and state aforesaid, repaired to the house of Mr. Le Roy Stafford, inhabitant of the said parish of Rapides, state of Louisiana; when at his request and at his dictation, the following instrument was written by me, and declared by the said Le Roy Stafford to be his last will and testament."

After setting out the dispositions of the testator, the notary declares:

"In testimony whereof, the said Stafford has caused his name to be signed hereto by L. A. Robert, he not being able from present debility, an effect of repeated attacks of rheumatics in the right hand and wrist, in presence of Jesse D. Wright, L. A. Robert, and Joseph J. Robert, witnesses, residing in this Parish; and we, the said notary, after having read the same in an audible voice, in the presence of the testator and the said witnesses, without interruption, and without turning aside to other acts, this 10th day of January, A. D. 1835."

LE ROY STAFFORD, *by L. A. Robert.*

Witnesses:
JOSEPH J. ROBERT,
L. A. ROBERT,
J. D. WRIGHT.

Done and passed before me, W. B. PEARCE, *notary public.*

The counsel for the defendants, insist, that the will could not have been dictated by the testator, inasmuch as it is so declared in the commencement of the instrument, and not after the dispositions were made; that is to say, the notary erred in declaring that it was dictated before the dictation could have taken place.

The declaration made by the notary in a will that it "was written as dictated by the testator," may as

We cannot assent to this reasoning, for no matter in what part of the will, the notary declared he wrote it from the dictation of the testator; it may, nevertheless, be true, that he wrote it as dictated. Toullier, in treating of this very subject, says: "*Au reste, il n'est pas nécessaire que la mention*

que la testament a éte écrit par le notaire, se trouve à la fin de l'acte; il suffit qu'elle se trouve au commencement, ainsi que la décidé un arrêt. La Cour de Cassation, du 26 juillet, 1808. *Touillier, vol.* 10, *page* 149, *No.* 425. It is unnecessary to multiply authorities upon a point too plain to admit of a doubt.

2d. The counsel for the appellants, also contends, that as the testator did not sign the will, his declaration of the cause of his inability should have been expressly mentioned by the notary, and cites article 1572 of the code, which declares: "This testament must be signed by the testator. If he declares that he knows not how, or is not able to sign, express mention of his declaration, as also of the cause that hinders him from signing, must be made in the act."

The clause of this article, upon which reliance is had, is disconnected by the conjunction *or:* so that if the testator declare, that he *knows not how to sign*, this declaration must be made by the notary, for whether he knows how to sign his name or not, is best known to himself; but any physical disability that prevents him from signing, may be well stated by the notary, without any declaration having proceeded from the testator.

This construction of the code is justified by the interpretation given to a similar law in France, by a distinguished jurist of that country.

"*La mention que le testateur a signé le testament, et la declaration faite ensuite par le notaire que, attendue une faiblesse survenue au testateur, celuici n'a pu signer n'offre qu'une contradiction apparente, et ne vicie point le testament l'ensemble de l'acte présente avec vérité ce qui s'est passé savoir, que le testateur avait, sur la demande du notaire, déclairé qu'il signerait, croyant pouvoir le faire, mais qu'il ne la pu ensuite.*"

Upon the whole, it does not appear to us, there is any error in the decree of the court below.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Court of Probates be affirmed with costs.

well precede the dispositions, as to follow them at the the close of the instrument. Either would be sufficient.

It is sufficient for the validity of a will, that it is signed by another person *for the testator*, in his presence and that of the witnesses, if it is declared that the testator is unable to sign from any physiael cause as rheumatism, debility by sickness, etc. The disability may be declared by the notary, without any declaration from the testator.

MECHANICS' AND TRADERS' BANK vs. PRESCOTT.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CARROLL, THE JUDGE THEREOF PRESIDING.

Corporations are not absolutely bound, *literally*, to use the name and style given them in their acts of incorporation. A slight alteration in stating the *name*, is unimportant, if there be no possibility of mistaking the identity of the corporation suing.

This is an action against the defendant, as the maker of a promissory note. The defendant admitted his signature, and pleaded a general denial; and by way of exception alleged, that the bank was not authorized to sue in the style and manner it had done.

In the petition, the plaintiff is stated to be "*The President, Directors, and Company* of the Mechanics' and Traders' Bank of New-Orleans." In the charter of the bank, it is styled, "The Mechanics' and Traders' Bank of New-Orleans," and in that name alone, it is to "sue and be sued, etc." The court overruled the exception, and gave judgment for the plaintiffs, from which the defendant appealed.

Dunlap, for the plaintiff.

Selby, contra.

Martin, J., delivered the opinion of the court.

The defendants and appellants seek the reversal of the judgment, on the ground, that the court below erroneously overruled their exception to the petition, in which the plaintiff sues by the name and style of "The President, Directors, and Company of the Mechanics' and Traders' Bank of New-Orleans, in violation of the 423d article of the Louisiana Code, which provides, that corporations shall sue by the name and style given them in their respective charters: the name and style given to the plaintiff in the act of incorporation, being the "Mechanics' and Traders' Bank of New-Orleans."

It does not appear to us that the exception was erroneously overruled. The article of the code cited, does not absolutely require, that corporations should literally use the name and style given them by the legislature, but tolerates a slight alteration in the name as unimportant.

In the present case, the deviation is slight and unimportant, since it does not allow the possibility of a mistake, in ascertaining the identity of the corporation suing.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

KIMBALL'S ADMINISTRATOR *vs.* DUNN'S HEIRS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF NATCHITOCHES.

The *residence* of an appellee may be shown, *aliunde*, by affidavit offered in the Supreme Court, to be in another state, and service of the process of appeal on his attorney will be good, notwithstanding he states in his original petition that "he is a resident" of the state.

In making service of petition and citation of appeal on the attorney of the appellee, the sheriff need not state the name, age and condition of the person he left them with at the attorney's domicil. It is only necessary to return, that he left them at his domicil.

The sheriff's return is not required to state, that copies of citation and petition of appeal were left at the *usual* domicil of the appellee, when it is not shown he had several domicils.

A curator *ad hoc* must be appointed to *minors*, or other persons intended to be sued, and who are without a curator *ad litis*, or who are absent and not represented in the state.

A reasonable time will be allowed for the return of a commission sent to a distant parish to take evidence; in a court of probates, sitting monthly, a continuance should be granted with more facility than in a district court which only sits semi-annually.

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KIMBALL'S ADMINISTRATOR *vs.* DUNN'S HEIRS.

This is an action instituted by the administrator of Jonathan R. Kimball, deceased, to recover from the heirs of John R. Dunn, Esq., deceased, the amount of moneys collected by him, as the attorney of Kimball's succession, and not paid over. The heirs of Dunn all reside out of the state, and suit was instituted against Carr and Campbell, attorneys at law, residing in Natchitoches, as the *attorneys in fact*, of Dunn's heirs. Three of the heirs were admitted to be minors, and a curator *ad hoc* was prayed for to represent them, and accordingly appointed. Judgment was then prayed against the attorneys in fact in that capacity, for the sum of two thousand nine hundred and five dollars, the amount alleged to be due by Dunn to the estate of Kimball.

Service of the petition was accepted by Carr and Campbell, attorneys in fact of the heirs of Dunn. Suit was commenced, service accepted, and judgment by default entered, all at the November term, 1837, of the Probate Court. On the next day, the suit was continued by consent.

At a subsequent term, to wit, 22d January, 1838, the judgment by default was set aside; an answer filed to the merits, and an order made for leave to take testimony generally, with a peremptory rule to try the case at the next term, to which it was continued.

The attorneys, who are made defendants, pleaded the general issue, and set up a demand against the plaintiff in compensation and reconvention, amounting to three thousand two hundred and fifty-two dollars, according to an account annexed, for which they pray judgment.

On the same day an affidavit was filed and a commission asked for to take the testimony of a Mr. White, in New-Orleans.

At the February term of the court, an order was made, appointing Carr and Campbell curators *ad hoc*, to represent, in that capacity, the minor heirs of Dunn, and due service thereof made on them.

At the March term, the cause was called for trial. The defendants objected to going into the trial, on the ground, that the delay allowed for answering had not elapsed;

whereupon the counsel for the plaintiff moved to rescind the order appointing the curators *ad hoc*, which motion was opposed by the defendants' counsel, because it was necessary that the minor heirs should be represented, inasmuch as they had a plea in reconvention pending; but the court sustained the motion and revoked the order, to which the defendants' counsel excepted.

At the same time the defendants moved for a continuance, on the ground, that a commission, which had issued in February, and sent to one of the associate judges in New-Orleans, to take the testimony of White, had not been returned; but the court refused the motion, on the ground, that it did not appear that proper diligence had been used, to which refusal the defendants took their bill of exceptions.

The clerk's testimony was taken on this motion, to show the diligence used, in which he states, that the commission was taken out the 12th February, and after regular service on the adverse party, and three days delay allowed to propound interrogatories, it was sealed up and sent by a steamboat, directed to the Hon. O. P. Jackson, in New-Orleans, about the 20th February. This was done at the request of one of the counsel of the defendants, in order to expedite the execution and return of the commission, the steamboat going and returning quicker than the mails. It was also shown, that the commission came speedily to the judge's hands, but had not been returned when the case was called for trial.

On the merits, and after hearing the evidence adduced by the parties, the probate judge rendered judgment for the plaintiff in the sum of ten hundred and twenty-six dollars, from which the defendants appealed.

Service of the appeal was made on one of the attorneys of the appellee, "by leaving copies of the petition and citation at his domicil, with his wife;" and an affidavit offered in this court, of a disinterested person, to show that the appellee resided out of the state.

Morse and *Roysdon*, for the plaintiff, moved to dismiss the appeal, because the sheriff's return stated the service was

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made by serving "a copy of the petition and citation upon the wife of P. A. Morse, attorney for the plaintiff, at his domicil, personally," when by law service of the petition and citation in appeal, should have been made personally on the appellee, as he states in his petition that he is "*of the city of New-Orleans*," in this state. *Code of Practice, article* 582.

2. The sheriff's return does not state the *name* of the person with whom copies were left, only that it was the *wife* of the attorney.

3. The service is bad, because the return states that a copy was left *at the domicil* of the attorney, without stating it to be his *usual* domicil.

4. No affidavit can be received of the non-residence of the appellee; and it would be contradicting the record to receive it, inasmuch as he states in his petition that he "is of New-Orleans" in this state. *Code of Practice, article* 189, 201, 582, 584. 4 *Martin, N. S.*, 238. 5 *Ibid.*, 427. 6 *Ibid.*, 309. 8 *Ibid.*, 282. 6 *Louisiana Reports*, 138.

5. On the merits, the judgment is fully sustained by the evidence, and should be affirmed.

Sherburne, for the defendants, stated, that service of the petition and citation of appeal was properly made on the attorney of the appellee, by leaving copies at his domicil, when it is shown by the affidavit of Curtis, filed in this court, that the appellee resides in Mississippi. *Code of Practice*, 582.

2. The defendant's motion for a continuance was improperly overruled at the trial, and the cause should, therefore, be remanded. The case was not, in fact, ready for trial.

Martin, J., delivered the opinion of the court.

The dismissal of the appeal is prayed for, on a suggestion, that the appellee, as it appears from the record, is a resident of New-Orleans, and the citation and petition of appeal has been served on his attorney.

2. That the sheriff's return does not state the name of the person with whom the copies of the petition and citation were left.

3. That the return states the copies were left at the domicil of the attorney, without stating it to be his *usual* domicil.

I. The residence of the appellee may be proved *aliunde*, than by his own statement in the petition. The appellant has filed the affidavit of an indifferent person, stating that the appellee resides in the state of Mississippi. In such a case the service may be well made on his attorney.

II. The article 582 of the Code of Practice, directs the service of petition and citation of appeal, to be made on the attorney, by delivering him copies, or leaving them at his *usual domicil*, without requiring, as is done in petitions and citations in original suits, that the sheriff should state the names of the person, &c., to whom he delivers them.

III. When the sheriff's return states, that copies have been left at the domicil of the party, it may be shown that he had two domicils and the copies were not left at the *usual* one. The presumption, however, is, that a man has not several domicils. As it is not alleged in this case, that the attorney had several domicils, it was useless to add, that copies were left at his *usual* one.

The appeal must, therefore, be sustained.

Our attention is first drawn to a bill of exception taken by the appellants, to the rescission of an order appointing curators, *ad hoc*, to the minor heirs of Dunn, defendants in the suit, which was brought against their attorneys in fact. It appears to us the court erred. The appointment of a *curator ad hoc*, was required by the Code of Practice, article 116, which says, " if the *minor*, whether under or above the age of puberty, against whom one intends to institute a suit, has no tutor, nor curator *ad lites*, the plaintiff must demand that a curator, *ad hoc*, be named to defend the suit. The same course must be pursued, if the person intended to be sued, *be absent and not represented in the state.*"

The order, appointing a curator *ad hoc* to the minor heirs of Dunn, must be reinstated.

We mean not to express any opinion on a question presented in this case, but which has not been raised in

The *residence* of an appellee may be shown, *aliunde*, by affidavit offered in the Supreme Court, to be in another state, and service of the process of appeal on his attorney will be good, notwithstanding he states in his original petition that "he is a resident" of the state.

In making service of petition and citation of appeal on the attorney of the appellee, the sheriff need not state the name, age, and condition of the person he left them with at the attorney's domicil. It is only necessary to return that he left them at his domicil.

The sheriff's return is not required to state that copies of citation and petition of appeal were left at the *usual* domicil of the appellee, when it is not shown he had several domicils

A curator *ad hoc* must be appointed to *minors* or other persons intended to be sued, and who are without a tu-

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either court, to wit: whether a suit can be brought against an attorney in fact, especially when his alleged principals are minors?

tor or curator *ad litis*, or who are absent and not represented in the state.

Our attention is next drawn to a bill of exception of the defendants and appellants, to the refusal of the court to grant a continuance, on the ground that they had not used proper diligence in procuring the return of a commission to take testimony.

The commission was sent to New-Orleans, about the 20th February, by a steam-boat, and soon reached the hands of the commissioner. The cause was called for trial on the 26th of March following. It does not appear that more than a month elapsed between the time when the commission was received by the commissioner and the day of trial. Although in many cases, a month may be sufficient for the execution and transmission of a commission, circumstances may often retard its arrival beyond that period. In a court of probates which sits monthly, a continuance ought to be granted with more indulgence and facility, than in a district court which only sits semi-annually.

A reasonable time will be allowed for the return of a commission sent to a distant parish to take evidence. In a court of Probates, sitting monthly, a continuance should be granted with more facility than in a district court which only sits semi-annually.

It appears to us the continuance ought not to have been refused. It is true, there was a peremptory rule for the trial of this case in March. On such a rule the court may be more strict, but is not prevented from granting a continuance if it believes justice will be promoted thereby.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Court of Probates, be annulled, avoided and reversed, and the cause remanded for a new trial, according to law; the plaintiff and appellee paying the costs of the appeal.

PRATT *vs.* GRAPPE.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE DISTRICT PRESIDING.

A challenge to the array, on the ground that the jurors were irregularly drawn, will be disregarded, and the trial proceeded in, when it does not appear there was any *material* irregularity in drawing them.

The mere fact that the clerk, while writing down the list, requested the sheriff to draw the names of the jurors from the box, does not vitiate the array so as to set aside the panel.

This is a petitory action to recover seventy-three acres of land, purchased from the government of the United States. by one S. Bordelon, as evidenced by the receiver's certificate, dated 9th July, 1836, and by him conveyed to the plaintiff. He alleges, the defendant is in possession of a part of this land, and refuses to give it up. Wherefore he prays judgment, restoring to him such part as the defendant claims, together with two hundred dollars in damages and costs.

The defendant pleaded a general denial, and averred, that the land he is in possession of, he holds under his father's will, who derived title from the Spanish government, and confirmed by act of Congress; but if he is dispossessed of any part, he is entitled to be paid for his improvements, which he avers are worth one thousand dollars.

On these issues and pleadings the cause was tried before the court and a jury.

On the trial of the case, the defendant's counsel challenged the array of the jury, on the ground that the names of the jurors summoned to this term, were irregularly drawn from the box, in this, that they were not drawn by the clerk of the court, as the law requires, and in support of the motion, annexed a copy of the list of jurors made out by the parish judge, &c., and also a copy of the *venire* and certificate thereto, of the jurors summoned for the present term of the court. To explain the latter, the plaintiff's counsel offered S. M. Hyams, Esq., clerk of the court, to testify as to the manner the jurors were drawn. He stated, that the sheriff put the names, certified in the list of the parish judge, on

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separate tickets into the box; and at his (clerk's) request, the sheriff drew the names of the jurors forming the *venire* from the box, in presence of him (clerk) and two magistrates, whilst one of the magistrates and himself wrote down their names. He says, he requested the sheriff to draw the names for him, in consequence of one of the magistrates desiring him to write down the names; that he wrote faster than the magistrate. He considered it no difference whether he drew the tickets out with his own hand, or another for him in his presence. The court overruled the challenge to the array, and admitted the clerk to testify; to both of which decisions of the court, the defendant's counsel took his bill of exceptions. The justices of the peace made the following certificate at the foot of the *venire*: "We, the undersigned magistrates, of the parish of Natchitoches, do hereby certify, that the above named jurors *were drawn in our presence*, at the town of Natchitoches, the 15th March, 1838." Signed by both.

On the evidence adduced by the parties, the jury returned a verdict for the plaintiff, giving him the land claimed. The defendant moved for a new trial, on the ground that the verdict was contrary to law and evidence, and that the jury which tried the case, was illegally and informally drawn. The motion was overruled, and from judgment confirming the verdict the defendant appealed.

Sherburne and *Campbell*, for the plaintiff.

Barry, *Bryce* and *Carr*, for the defendant.

Martin, *J.*, delivered the opinion of the court.

In this case the plaintiff sues for the recovery of a tract of land, which his vendor had purchased from the United States. The defendant sets up title, purporting to be derived from the Spanish government, and confirmed by an act of the congress of the United States. There was a verdict and judgment against him, and he appealed.

His counsel complains, that the District Court disregarded the challenge made by him to the array of the jury, on the

ground that the jurors summoned, were irregularly drawn. In support of his challenge, a copy of the list of jurors made out by the parish judge and justices of the peace, from the persons subject to pay taxes, was produced ; and also a copy of the *venire* and certificate thereto, which was summoned for the term of the court.

The certificate of the two justices of the peace at the foot of the *venire*, attests, that the names of the jurors were drawn in their presence, without mentioning by whom. On this the plaintiff offered the clerk as a witness, who deposed, that he was requested by one of the magistrates to write down the names of the jurors as they were drawn, because he wrote with more facility ; that accordingly, he, the clerk, requested the sheriff who was then present, to draw for him the names of the jurors from the box, which was done, while the clerk and the other magistrates took down the names of the jurors as they were drawn.

To the admission of the clerk's testimony, and to the rejection of the challenge to the array, the defendant's counsel excepted.

A challenge to the array, on the ground that the jurors were irregularly drawn, will be disregarded, and the trial proceeded in, when it does not appear there was any *material* irregularity in drawing them.

The mere fact that the clerk, while writing down the list, requested the sheriff to draw the names of the jurors from the box, does not vitiate the array so as to set aside the panel.

It appears to us the testimony of the clerk was unnecessary. No irregularity in the drawing of the jurors was apparent on the face of the certificate offered, nor was any shown in any other manner. The magistrates certify that the jurors were drawn in their presence. If it was necessary that they should have added that the names were *drawn by the clerk*, it would have been equally so to add that they were drawn out of a box into which the sheriff had put the ballots containing the names of all the inhabitants of the parish, liable to pay taxes, according to a list furnished by the parish judge. The testimony of the clerk, if examined, shows that the jurors were properly drawn. 1 *Moreau's Digest*, 299, 622, *sec.* 4, 5.

On the merits, the plaintiff has shown title to the land claimed, and nothing appears which authorizes us to disturb the verdict of the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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WARREN *vs.* ALLNUTT.

WARREN
vs.
ALLNUTT.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

In an action against the maker of a note, the plaintiff must prove a demand of payment made at the place indicated in the obligation, before he can recover.

This is an action by the holder or payee of a promissory note, signed by the defendant, and made payable at the office of discount and deposit, of the Planters' Bank of Mississippi, at Port Gibson.

The defendant pleaded a general denial. There was no evidence that the note was presented for payment at the Branch Bank, at Port Gibson, the place specified on its face. It was, however, protested for non-payment, by a notary public in Natchez, who states that "he demanded payment by going to the Planters' Bank, state of Mississippi, and was informed there were no funds in bank, for the payment of said note."

The district judge, however, gave judgment for the plaintiff, and the defendant appealed.

Dunlap and *Dunbar*, for the appellant, assigned for error: that there was no evidence in the record, to show a demand of payment, at the place specified in the note, and that in fact, no demand is alleged, or was ever made, which is a condition precedent to the right of recovery. The judgment should, therefore, be reversed, and one given for the defendant.

Carleton, J., delivered the opinion of the court.

This action is instituted by the endorsee against the maker of a promissory note, executed at Rodney, and made payable at the office of discount and deposit, of the Planters' Bank of the state of Mississippi, at Port Gibson.

The defendant answered by general denial. There was judgment for the plaintiff, and the defendant appealed.

The notary public, who resides at Natchez, states in his protest, that "he went to the Planters' Bank, state of Mississippi, and was informed by the teller, there were no funds in bank for the payment of the above mentioned note."

It is not shown that the demand was made at the place of payment, indicated in the note; on the contrary, it would seem from the language of the protest, that it was actually made at Natchez, and not at Port Gibson, where it ought to have been made according to the tenor of the note.

In an action against the maker of a note, the plaintiff must prove a demand of payment made at the place indicated in the obligation, before he can recover.

It has been frequently held by this court, that no recovery could be had in such cases, unless demand of payment be made at the place agreed on by the parties to the obligation. 3 *New Series*, 423. 10 *Louisiana Reports*, 552.

We think that the plaintiff has failed to make out his case, and that there is error in the judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that there be judgment against the plaintiffs as of non-suit, he paying costs in both courts.

SHIFF *vs.* HERTZOGG.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE DISTRICT PRESIDING.

If after prescription has run, the maker of a note, in a letter to the holder of it, acknowledges the existence of the debt, but says a prolongation of the time of payment had been allowed him, it will take the case out of prescription.

This is an action on a promissory note, executed and signed by the defendant, the 16th August, 1822, for four hundred and one dollars, payable in all the month of March,

1823. The note was protested for non-payment, the 4th April, 1823. Suit was brought and citation served the 8th May, 1838. The defendant pleaded the prescription of five years.

The plaintiff offered the note and protest in evidence; and also a letter from the defendant, in which he acknowledged the debt; dated 16th February, 1834.

Upon this evidence, the district judge gave judgment for the plaintiff, from which the defendant appealed.

Sherburne, for the plaintiff.

Carleton, J., delivered the opinion of the court.

This suit was instituted on the 2d day of May, 1838, by the endorsee of a promissory note, executed by the defendant, on the 16th August, 1822, payable in the month of March, 1823.

If after prescription has run, the maker of a note, in a letter to the holder of it, acknowledges the existence of the debt, but says a prolongation of the time of payment had been allowed him, it will take the case out of prescription.

The defendant plead the prescription of five years, which being overruled by the court, there was judgment for the plaintiff, and the defendant appealed. The plea of prescription, presents the only point for the consideration of this court.

Among the documents introduced by the plaintiff at the trial of the cause, is a letter from the defendant of the 15th February, 1834, which holds the following language: "*Vous me parlez d'un billet de* $401, *echu en mars* 1823, *dont je vous suis rederable ayant d'autres dettes resultant du malheur qui m'arriva vers cette apoque, afin de conserver au moins la chance de les payer, j'obtins de mes principaux créancier en* 1828, *neuf ou dix ans de terme, sans interet — l'intérêt de mes créanciers d'alors me fait un devoir de vous renvoyer aux epoques susdits; j'espére que vous y consenterai,*" *&c.*

We think with the plaintiff's counsel, that this letter amounts to an acknowledgment of the creditor's right, and takes the note out of the prescription contended for by defendant, and that there is no error in the judgment of the court below. *Louisiana Code, article* 3486.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HOGAN *vs.* GIBSON.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT (NOW 9th) FOR THE PARISH OF CONCORDIA, THE JUDGE OF THE SECOND PRESIDING.

In an action on a *quantum meruit*, the defendant may show that there was a verbal or written contract between the parties; and if a contract really existed, the plaintiff who sues on a *quantum meruit*, cannot recover.

Parole evidence is admissible; first, to show the form of a contract between plaintiff and defendant, whether it be written or *verbal;* and if the latter, to make proof of it.

Evidence of a verbal contract will not be admitted, until the court is satisfied there is no written one; and when the court permits evidence of a verbal contract to go to the jury, it is proof to them that there is no written one.

The jury is to be guided by the evidence allowed to go before them by the court; and they cannot pronounce on evidence not before them; nor inquire into the correctness of the judge in rejecting or admitting particular evidence.

On a *quantum meruit*, the plaintiff cannot recover for *extra* work, alleged to have been done.

This is an action on a *quantum meruit*, in which the plaintiff sues as the assignee of John Evans, to recover the sum of two thousand three hundred and eighty-four dollars, for work and labor done, and materials furnished, in building for the defendant, a cotton gin and mill house, of large dimensions, and of good workmanship.

The plaintiff alleges, that the work, labor and materials, employed by said Evans in the construction of said gin and

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mill house, were well worth the sum of four thousand five hundred dollars; that a partial payment on account of said work had been made, amounting to one hundred and fifteen dollars, to Evans, leaving the sum claimed as yet due and owing, which has been regularly assigned to him. He prays judgment therefor.

The defendant avers, the gin and mill house were built, and materials furnished under a verbal contract between him and Evans, in which it was stipulated, the work was to be finished by the first of September, 1835, and he to be allowed for the work and materials, the sum of two thousand five hundred dollars; that before he was notified of the transfer of this claim, he had already paid the sum of two thousand one hundred dollars, which was more than he owed Evans; that Evans failed to build said gin and mill by the time stipulated, and put him to great inconvenience and loss in ginning his crop, to his damage one thousand dollars, and owes him three hundred dollars for boarding, which he pleads in compensation of plaintiff's demand.

The cause was tried by the court and a jury. The witnesses testified, that there had been a contract entered into between the parties, which was reduced to writing, but never signed; that Evans said to witnesses, he was to build a gin with one stand for two thousand five hundred dollars, and also a mill house, and furnish all the materials. The gin was not finished until the beginning of 1837.

The plaintiff excepted to the charge of the judge, and to the admission of the testimony of witnesses to prove a verbal contract, when it appeared by their testimony, it had been reduced to writing. The jury returned a verdict for the defendant, and from judgment rendered thereon the plaintiff appealed.

Dunlap and *Dunbar*, for the plaintiff.

The District Court erred in receiving parole evidence of a contract, which is shown by the disclosures of the witnesses, to have been reduced to writing. The written contract should be produced; and as it was never signed, neither it

or a verbal contract can be established. 5 *Louisiana Reports*, 457.

2. The plaintiff had a right to recover on a *quantum meruit*, by showing that extra work was done, and that the gin house was of larger dimensions than was originally proposed, by which the defendant profited, as he accepted it. 4 *La. Reports*, 101.

3. The court erred in deciding that there was no written contract, and charging the jury to this effect, when that was a fact to be left for their verdict. This question should not have been withdrawn from them. *Code of Practice*, 516.

4. The judgment should be reversed on these grounds, and others; especially because the judge charged that the plaintiff, suing on a *quantum meruit*, could not recover for *extra work*, in case the defendant proved the verbal contract, pleaded in his answer.

Stacy, for the defendant, admitted the building of the gin, &c., but contended, that it was properly and fully shown to have been built in pursuance of a verbal agreement, and that it had been paid for according to contract.

2. The circumstance of a verbal contract existing, precludes any recovery on a *quantum meruit*.

Bullard, J., delivered the opinion of the court.

The plaintiff sues to recover the value of work done, and materials furnished by his assignor in constructing a gin for the defendant.

The defence was, that the work was done in pursuance of a verbal contract, and that the stipulated price has been paid. He further alleges, that he sustained great loss by the delay of Evans, the assignor, to complete the gin at the time stipulated; which, together with three hundred dollars for boarding and lodging, he claims in compensation.

There was a verdict for defendant, and judgment having been pronounced accordingly, the plaintiff appealed.

The case comes before this court upon several bills of exception. From one of them it appears, that on the trial

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In an action on a *quantum meruit*, the defendant may show that there was a verbal or written contract between the parties; and if a contract really exists, the plaintiff who sues on a *quantum meruit*, cannot recover.

Parole evidence is admissible, first, to show the form of a contract between plaintiff and defendant, whether it be written or *verbal;* and if the latter, to make proof of it.

Evidence of a verbal contract will not be admitted, until the court is satisfied there is no written one; and when the court permits evidence of a verbal contract to go to the jury, it is proof to them that there is no written one.

The jury is to be guided by the evidence allowed to go before them by the court, and they cannot pronounce on evidence not before them, nor inquire into the correctness of the judge in rejecting or admitting evidence.

the defendant offered to prove a verbal contract, and it appearing from the testimony of one of the witnesses, that a contract had been reduced to writing, the plaintiff's counsel objected to any parole evidence of the contract, on the ground that the written contract was the best evidence, and must be produced, or accounted for, and if the said writing was unsigned, and they contemplated a written contract, no evidence could be admitted of it until it was signed. But the court disregarding the objection, proceeded to inquire whether there was a written contract, and having been satisfied there was not, admitted evidence of a verbal one, as averred by the defendant in his answer. It appears to us the court did not err. It was not material whether the contract was by parole or in writing, as relates to the plaintiff, because if a contract really had been entered into between the parties, the plaintiff who sued upon a *quantum meruit*, could not recover; and the only motive for inquiring into the form of the contract, was to ascertain whether parole evidence was admissible. The law does not require that such a contract shall be reduced to writing and signed.

The charge of the judge to the jury was also excepted to. They were told that the question for their examination was, whether the defendant had shown a verbal contract as stated in his defence; that the court having permitted the defendant to give evidence of a verbal contract, was proof to them that there was no written one; that the court could not admit evidence of a verbal contract, until satisfied there was not one in writing, and having admitted such evidence the province of the jury was confined to the testimony, in reference to a verbal contract. The court further stated, that under the pleadings, if the jury was satisfied there was a contract, as stated in the answer, they were bound to find a verdict for the defendant, and that the plaintiff could not recover for extra work in the present form of action.

We concur with the judge in this charge. Nothing is better settled than that the jury is to be guided by the evidence before them; and it is exclusively the province of the court, to admit or exclude evidence, and the jury cannot pro-

nounce upon evidence not before them, nor inquire into the correctness of the judge, in rejecting or admitting particular evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ting particular evidence.

On a *quantum meruit*, the plaintiff cannot recover for *extra* work, alleged to have been done.

FRIEND *vs.* BOWMAR.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

Where the testimony shows the ownership of the note sued on, to be in the plaintiff at the institution of suit, he will recover, notwithstanding his attorney may have improperly erased the blank endorsements showing the regular transfer by endorsement to him.

This is an action against the maker of a promissory note, for eleven hundred dollars, payable to the order of one Levi Guice, and by him endorsed in blank. The note was given for part of the price of a tract of land, for which a mortgage was retained to secure payment.

The petitioner alleges, that Guice endorsed said note in blank and transferred it and the mortgage to E. K. Wilson, by a notarial act, who endorsed it in blank and assigned it and the mortgage by notarial act to Joseph Friend, who in like manner assigned and transferred the note and mortgage to George Row, and was by him transferred to the petitioner, without any endorsement or written assignment. He further alleges that he is the true owner of said note, but that G. W. Copley, his attorney, through error partially erased said endorsements: That the defendant afterwards mortgaged the land already mortgaged to secure the payment of this note, to one C. S. Abercrombie, of Mississippi, to secure a certain sum of money

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therein named, and that an order of seizure and sale had been obtained, and the land advertised to be sold under said last mentioned mortgage. He prays for judgment, and that the mortgaged premises be sold to satisfy the same, and that the proceedings under the order of seizure, taken out on Abercrombie's mortgage, be stayed and it declared null, as being made in fraud.

The defendant pleaded a general denial, and *res judicata.* That judgment had already been obtained against him on said note by S. Guice the original payee; and that the mortgage in favor of Abercrombie is *bonâ fide.* He avers he has sustained damages to the amount of two thousand dollars by this vexatious proceeding of the plaintiff, for which he prays judgment in reconvention.

On these pleadings and issues the case was tried. Upon the evidence adduced there was judgment for the plaintiff for the amount of the note, with mortgage, and the mortgaged premises to be sold, &c. The defendant appealed.

Downs, for the plaintiff.

M'Guire, for the appellant.

Carleton, J., delivered the opinion of the court.

The plaintiff alleges that he is the holder of a promissory note, executed by the defendant in favor of Levi Guice, by whom it was endorsed in blank, and also transferred by notarial act to Ephraim K. Wilson, who also endorsed the same in blank, and transferred it by notarial act to Joseph Friend, who likewise endorsed it in blank, and transferred it by notarial act to George Row, by whom it was transferred to the petitioner, by mere delivery. There was judgment for the plaintiff and the defendant appealed.

The appellant insists that Row was in truth the owner of the note, on the 25th of August, 1837, the date of the institution of the suit; and to establish this fact relies upon the testimony of his counsel, Robert F. M'Guire, who declares that Row told him that the note sued on was his property,

and that this declaration was made to him a very short time after the commencement of the suit.

The witness, M'Guire, adverts in his testimony to the document marked D, in the records, which is signed by Row, and made part of the evidence in the case. In this document Row declares, that he transferred the note to the plaintiff in the month of June next preceding the institution of the suit; and moreover attests to all the endorsements set out in the petition.

From this testimony it clearly appears, that the ownership of the note was in the plaintiff at the time of the institution of the suit, independently of the presumption of property which the law attaches to the possession. It appears furthermore, that the blank endorsements on the note were erased by Copley, the plaintiff's counsel, after it was put in his hands for collection. Whatever may have been the motive of the attorney in making the erasures, we think this unauthorized act ought not to prejudice the plaintiff, in whom the right to the note had fully vested.

Where the testimony shows the ownership of the note sued on to be in the plaintiff, at the institution of suit, he will recover, notwithstanding his attorney may have improperly erased the blank endorsements, showing the regular transfer by endorsement to him.

We are of opinion that the judgment of the court below ought to be affirmed; but that it is not a proper case for damages as prayed for in the answer on the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

GARRETT *vs.* KNOX'S ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF OUACHITA.

Where the evidence is contradictory, and the case turns on facts, if the judgment of the judge *a quo*, who heard the witnesses and had the best opportunity of testing their verity, is not manifestly erroneous, it will be affirmed.

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GARRETT *vs.* KNOX'S ADM'R.

This was an action on a merchant's account, against the administrator of Wm. O. Knox's estate, to recover the sum of three hundred and seventy-eight dollars and seventy-six cents, according to an account annexed.

The defendant pleaded a general denial, and prescription of a year; and further set up a demand in compensation and reconvention for a crop of cotton, which the plaintiff had sold for the deceased Mr. Knox, in his life time.

Upon these allegations and averments there were several witnesses examined. The plaintiff called a witness who had been his clerk and proved his account. There was then testimony taken to discredit the plaintiff's principal witness; but in the opinion of the probate judge, who heard all the witnesses face to face, the defendant entirely failed to make good his averments, or disprove the evidence on the other side. Judgment was rendered in favor of the plaintiff for three hundred and twelve dollars. The defendant appealed.

Garrett, for the plaintiff.

M'Guire, contra.

Carleton, J., delivered the opinion of the court.

This suit is brought against the administrator of the succession of William O. Knox, deceased, for the amount of certain articles furnished, and moneys loaned, as set forth in the account annexed to the petition.

The defendant denies generally; pleads the prescription of one year, and compensation. There was judgment for the plaintiff, and the defendant appealed.

The controversy turns entirely upon the plea in compensation. Upon this point many witnesses were examined in the court below, and their testimony commented upon by the counsel on both sides at great length, before this court.

Where the evidence is contradictory, and the case turns on facts, if the judgment of the judge *a quo* who heard the wit-

The evidence is contradictory, and not easily reconciled; nevertheless, after the most full and careful examination we have been able to bestow upon it, we cannot perceive that the probate judge has come to an erroneous conclusion.

Having heard the witnesses in the first instance, he had the best opportunity of ascertaining the verity of their declarations. We have frequently said, that in questions of fact, this court would not disturb the judgment of the court below, unless manifestly erroneous; and we see no reason for departing from this rule in the case now under consideration.

nesses and had the best opportunity of testing their verity, is not manifestly erroneous, it will be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

HARRIS *vs.* ALLNUTT ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE PARISH OF CONCORDIA, THE JUDGE OF THE SECOND PRESIDING.

It is sufficient to maintain the appeal, if copies of the petition and citation come up in the record, instead of the originals.

When there is no evidence in the record, of the laws of the state where the transaction or contract in question was made, it will be decided according to the laws of this state.

The notary's declaration or certificate of notice of protest must state specifically the names of the drawer and endorser, and the time and manner of serving or forwarding the same, and be recorded, to afford *legal proof* of notice.

Where endorsers are discharged from liability for want of legal notice of the dishonor of the note, but assume the payment, and propose to arrange and take up the note, it will not be binding on them when the other party fails to show they were *not* ignorant of their rights and of their discharge for want of notice.

This suit is instituted on the following promissory note, against the endorsers, Edward R. J. Allnutt and John Briscoe.

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HARRIS vs. ALLNUTT ET AL.

"$2102 67. NEW-CARTHAGE, La., 16th March, 1835.

"On the first day of February next, I promise to pay John Briscoe, or order, two thousand one hundred and two dollars and sixty-seven cents, for value received, negotiable and payable at the Agricultural Bank at Natchez, Mississippi.

HENRY D. ALLNUTT."

Endorsed, "JOHN BRISCOE," and "EDWARD R. J. ALLNUTT."

The plaintiff alleges, that said note was deposited in bank, where it was made payable for collection, before maturity, and payment was amicably demanded and refused: wherefore, it was protested for non-payment and due notice thereof given to the endorsers, who have become liable. He prays judgment against them for the amount of his demand.

The defendants admitted their endorsement, but denied any liability to pay the note.

The evidence showed that this note was protested on the 4th February, 1836, and on the next day notices of protest were put in the post office at Natchez, directed to John Briscoe, Port Gibson, Edward R. J. Allnutt, New-Carthage.

The original record of the book of protests in which the protest was recorded, was offered in evidence, received by the court, and excepted to by the defendants' counsel.

It was admitted in the statement of facts that Port Gibson was not Briscoe's nearest post office. But letters addressed to defendant, Allnutt, at New-Carthage, had been received and answered by him.

When Briscoe was called on to pay this note as endorser, a witness states that he said he would see the other endorser and arrange it. They went together to see Allnutt, who said he would give other notes for the amount, but which was never done.

Upon this evidence, judgment was given for the plaintiff, from which the defendants appealed.

Downs, for the plaintiff.

Dunlap and *Dunbar*, *contra*.

Carleton, J., delivered the opinion of the court.

The appellees move to dismiss the appeal on the ground that copies of the petition and citation of appeal have come up with the record, instead of the originals. This motion cannot prevail. This court have heretofore determined that such copies were sufficient, and that it was not necessary to send up the originals themselves. 4 *Martin, N. S.*, 345 and 360.

It is sufficient to maintain the appeal, if copies of the petition and citation come up in the record instead of the originals.

The action is brought against the endorsers of a promissory note, who, it is alleged, were duly notified of the dishonor of the obligation by the drawer.

The defendants for answer, deny generally, but admit their signatures. There was judgment for the plaintiff, and the defendants appealed.

The notary public who protested the note, certifies at the foot of the protest, that "all notices were served this 5th day of February, 1836, at 9 o'clock, A. M., according to their several directions as above specified," without stating the manner in which the notices were given, that the court might judge of their sufficiency.

When there is no evidence in the record of the laws of the state, where the transaction or contract in question was made, it will be decided according to the laws of this state.

As there is no evidence before us of the laws of Mississippi, where the note was made and protested, we are compelled to have recourse to our own statute, which provides in such cases that the notary shall mention in his records, "the notices which he shall have given of his protests to the drawers and endorsers thereof, together with the names of the said drawers or endorsers, the date of the said notices, and the manner in which they were served, or forwarded to the said drawers and endorsers; which declaration, duly recorded, under the signature of the said notary public, and two witnesses, shall be considered and received in all the courts of this state as legal proof of said notices."

The notary's declaration or certificate of notice of protest, must state specifically the names of the drawer and endorser, and the time and manner of serving or forwarding the same, and be recorded, to afford *legal proof* of notice.

There exists, then, no proof of sufficient and legal notice having been given to the endorsers. But the counsel for the plaintiff, aware of the want of such proof, insists that the endorsers have assumed the payment of the note, and relies on the testimony of Mr. Martin, plaintiff's attorney, who states that "he made demand upon Briscoe personally, for the

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payment of the note sued on, told him he was instructed to sue him, if it was not paid, or some arrangements made. Says Briscoe told witness he would go to Allnutt, the other defendant, and arrange it. They went to Allnutt together; Allnutt said he would give other notes for the amount. Briscoe said he would see that Allnutt gave the notes. That Allnutt never gave him the notes in lieu of the notes sued on."

Where endorsers are discharged from liability for want of legal notice of the dishonor of the note, but assume the payment, and propose to arrange and take up the note, it will not be binding on them, when the other party fails to show they were *not* ignorant of their rights and of their discharge for want of notice.

Admitting that the defendants assumed the payment of the note, which is by no means clear, it does not, however, appear that they did so with a full knowledge that they were discharged from liability by want of notice. Being once exonerated, it cannot be supposed that they would readily renew their obligation; at any rate, it must be shown that they were not ignorant of their rights, or they would not be bound. 3 *Kent's Commentaries*, 113; *Chitty on Bills*, 308; *Martin's Reports*, 148.

This view of the subject renders it unnecessary to notice any other point raised in the cause.

We think that the plaintiff has failed to make out his case, and that there is error in the judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment against the plaintiff as of non-suit, he paying costs in both courts.

BRIGGS ET AL. *vs.* BRISCOE.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

The appellee may file an answer to the merits, and on the same paper make a written motion to dismiss the appeal.

If the citation be issued before the appeal bond is filed, the appeal will not, on that account, be dismissed. It is irregular, but it would be nugatory to issue another citation after filing the bond, when one had already issued.

In an action against the maker of a note, endorsed by the payee in blank the endorsees and holders, must prove the endorsement of the note to them before they can recover.

This is an action against the maker of the following promissory note. The plaintiffs, Briggs, Lacoste & Co., are a commercial firm, and residing in Natchez, Mississippi.

"$1333 1-2. WALNUT BAYOU, (La.) May 1st, 1833.

"On or before the first day of January, 1836, I promise to pay J. B. Warren, or order, the sum of $1333½, for value received, as witness my hand. "JOHN BRISCOE.

Endorsed—"J. B. WARREN."

The plaintiffs allege, that the defendant signed said note, which was endorsed by the payee before due, whereby the maker became liable to pay the same to the holders.

The defendant excepted, that as the plaintiffs, by their own showing, resided out of the state, to wit: in Natchez, Mississippi, and their attorneys also, and that if judgment should go against him, that he would be deprived of his right to prosecute an appeal, as process could not be served on either the plaintiffs or their attorneys.

The defendant then pleaded a general denial, and holds the plaintiffs to strict proof; and denied that the firm of Briggs, Lacoste & Co., was composed of the plaintiffs.

Judgment upon these pleadings and issues, defendant having admitted his signature, was given for the plaintiffs, and the defendant appealed.

Dunlap, for the appellant, assigned for error: 1. That the court erred in dispensing with proof of the capacity of plaintiffs to sue, it having been denied specially that the plaintiffs composed the firm of Briggs, Lacoste & Co.

2. The court erred in not requiring proof of the signature

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of the maker, and of the endorsement of the payee on the note.

3. No interest should have been allowed on the note, as none was stipulated or given by law.

4. The record of appeal was brought up by the appellee, who has pleaded to the merits and denied that there is error in the judgment; he has, therefore, waived any right to dismiss, on account of any defects in the appeal bond, or service of citation.

Cochran, for the appellee, moved to dismiss the appeal, because the appeal bond was taken and filed after citation of appeal was served.

2. Appearance and filing an answer to the appeal, is a matter of right, and a party is not restricted, he may plead in his answer. Appearance cures the defects only which are not pleaded. 10 *Louisiana Reports*, 550. 11 *Ibid.*, 452.

3. The appeal bond should have been filed before service of citation, as there is no right to bring the adverse party into the appellate, without giving bond for costs. Execution of the bond is a condition precedent. 5 *Martin*, 81–2. 10 *Louisiana Reports*, 253.

4. Without a sufficient citation in the first instance, the appeal will be dismissed. 7 *Louisiana Reports*, 70, 71.

5. Possession is *prima facie* evidence of title to the note, which is sufficient to authorize judgment when there is no special allegation of fraudulent, or illegal possession. 4 *Martin, N. S.*, 357.

Carleton, J., delivered the opinion of the court.

In this case the record was brought up by the appellee, who, in his answer, avers there is no error in the judgment of the court below; and on the same paper moves for a dismissal of the appeal, on the ground that the citation was served before the appeal bond was filed, and prays ten per cent. damages, as for frivolous appeal.

The appellant insists that the motion comes too late, inasmuch as the plea to the merits precedes the motion to

dismiss, notwithstanding both are written on the same paper, and cites 4 *Martin, N. S.*, 360. 4 *Louisiana Reports*, 67.

It does not appear to us material, whether the plea or motion precede in order on the paper, as they were filed simultaneously. We think the appellee should be heard on his motion to dismiss, which we think, however, should not prevail. For although it was irregular to issue the citation before the appeal bond was filed; yet, when once filed, the citation issued as a matter of course, and it would have been nugatory to issue another, when one had already been served. Moreover the appeal did not operate a supersedeas, and the appellee could derive no benefit from its dismissal, while it would be hard, if not unjust, to drive the appellant to the trouble and expense of another appeal, especially as the irregularity did not proceed from himself. We think the appeal ought to be sustained.

The appellee may file an answer to the merits, and on the same paper make a written motion to dismiss the appeal.

If the citation be issued before the appeal bond is filed, the appeal will not on that account be dismissed. It is irregular, but it would be nugatory to issue another citation, after filing the bond, when one had already issued.

This brings us to an examination of the merits.

The appellant asks for the reversal of the judgment, on the ground that there is no proof of the endorsement of the note to the plaintiff.

We have looked carefully over the record which is certified to contain all the evidence upon which the cause was tried in the first instance, and do not find any proof of the payee's endorsement. We think the plaintiffs have failed to make out their case, and that the judgment is erroneous.

In an action against the maker of a note, endorsed by the payee, in blank, the endorsees and holders must prove the endorsement of the note to them before they can recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be reversed, and that ours be for the defendant, as in the case of a non-suit, with costs in both courts.

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WARREN *vs.* BRISCOE.

WARREN *vs.* BRISCOE.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

In an action against the drawer of a bill, or maker of a note, a demand of payment and presentment of the note at the place indicated on its face, are indispensable, and must be shown, to enable the plaintiff to recover.

This is an action on the following promissory note:

"$6,666. RODNEY, Miss., January 1, 1835.

"Two years after date, I promise to pay J. B. Warren, or order, six thousand six hundred and sixty-six dollars, without defalcation, for value received, negotiable and payable at the Planters' Bank of Mississippi, at Natchez.

JOHN BRISCOE."

The plaintiff alleges, that on the 4th January, 1837, at the Planters' Bank of Mississippi, Natchez, *he demanded* payment of the said note, and afterwards his attorney made an amicable demand of payment, which the said John Briscoe refused. He prays judgment for the amount thereof.

The defendant excepted to the petition; averred that it set forth no cause of action; and contained no allegation of the legal presentment and demand of payment. This exception was overruled.

The notary in his protest states, that "he went to the Planters' Bank, Natchez, and was informed by the teller there was no funds in the bank for the payment of the said note, wherefore he protested, &c."

There was judgment for the plaintiff and the defendant appealed.

Dunlap, for the appellant, contended, that the court erred in overruling defendant's exception to the petition, and that it contained no sufficient allegation of presentment and demand of payment.

2. The protest offered, furnishes no evidence of presentment and demand at the place of payment. The answer made by the teller of the bank should not bind the defendant.

3. The court erred in allowing interest from the date of protest. The note was not payable in this state, and there is no stipulation to pay interest, or proof of the law or rate of interest in Mississippi.

Carleton, J., delivered the opinion of the court.

This action is instituted by the payee of a promissory note executed by the defendant at Rodney, negotiable and payable at the Planters' Bank of Mississippi, at Natchez.

The petitioner alleges, that he demanded payment of the note at the place therein indicated, to prove which he exhibits the protest of the notary, who declares that he "went to the Planters' Bank, Natchez, and was informed by the teller there were no funds in bank for the payment of the above mentioned note.

The defendant excepted to the plaintiff's petition, averring that it did not contain any allegation of legal presentment, and demand of payment of the note sued on.

The exception was overruled by the court, and thereafter judgment taken by default; which being confirmed, the defendant appealed.

It does not appear from the statement of facts coming up with the record, or from the protest of the notary public, which is made a part of that statement, or any other evidence on file, that any actual presentment of the note or demand was ever made at the bank.

In an action against the drawer of a bill, or maker of a note, a demand of payment and presentment of the note at the place indicated on its face, are indispensable, and must be shown, to enable the plaintiff to recover.

The law upon this subject has been long and well settled, that a demand of payment and presentment of the note at the place indicated by the instrument itself, are indispensable to the recovery. *Chitty on Bills, page* 385, 392, 401.

Under this view of the subject, we think the plaintiff has altogether failed to make out his case; wherefore it becomes unnecessary to notice any other point discussed at the trial.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be avoided and reversed; that there be judgment against the plaintiff as in case of non-suit, he paying the costs in both courts.

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Oct. 1838.

CUNY
vs.
ROBERT ET AL.

CUNY *vs.* ROBERT ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

All the parties in a suit, who have an interest to maintain the judgment, must be made parties and cited in the appeal, or it will be dismissed ; so warrantors must be cited, even when there is judgment for the defendant.

Where a decision on a point of practice is known and made public, no delay will be allowed the party to avail himself of it, at the trial of the appeal.

This is an action for the recovery of a female slave and her child, which the plaintiff alleges he purchased from G. C. Russell, by private act of sale dated the 3d June, 1832, for the sum of seven hundred dollars, and which are in the possession of the defendant, Robert.

The defendant pleaded a general denial, and averred that he purchased the slave from Isaac Franklin, in New-Orleans, whom he calls in warranty ; and who avers he purchased from Wm. Nichols, of Nashville, Tennessee, who bought from F. W. Armstrong, of Tennessee, who avers that G. C. Russell, put the slave in question, and others, into his (Armstrong's) hands, to sell for certain purposes, and in pursuance of this mandate he sold the slaves now claimed, to Wm. Nichols, of Nashville.

On these pleadings and issues the cause was tried.

The private act of sale from Russell to plaintiff, is acknowledged by the maker, and purports to sell the slave Lavinia and her child, for the sum of seven hundred dollars, payable in twelve months, for which the plaintiff executed his note.

The defendants' evidence showed, that Colonel Russell put this same slave into the hands of Major F. W. Armstrong, of Tennessee, to be sold on his account, and she was sold accordingly.

Upon the whole evidence of the case, the jury returned a verdict for the defendant, and from judgment rendered thereon, the plaintiff appealed.

Judgment being for the defendant alone, without the war-

rantors being mentioned therein, or it being for or against them, the appeal was taken as against the defendant alone. The warrantors were not made parties or cited in the appeal.

Winn, for the defendant and appellee, moved to dismiss the appeal, because the warrantors were not made parties and cited.

Dunbar, *contra*, insisted, that as judgment was only rendered against the defendant, the warrantors had no interest; and it was unnecessary to make them parties. If judgment was affirmed there would be an end of the case; and if it was reversed and the case remanded, a new trial would be had, in which the warrantors would have the right to be heard.

2. If it be necessary to bring in the warrantors, the court will allow time, as was done in the case of *Guerin et al.* vs. *Bagneris*. 9 *Louisiana Reports*, 471.

Martin, *J.*, delivered the opinion of the court.

This is an action to recover two slaves, in which the defendant called in his vendor in warranty, who in return called in his, &c. Judgment having been given against the plaintiff, he appealed.

All the parties in a suit, who have an interest to maintain the judgment, must be made parties, and cited in the appeal, or it will be dismissed: so, warrantors must be cited, even when there is judgment for the defendant.

When a decision on a point of practice is known and made public, no delay will be allowed the party to avail himself of it, at trial of the appeal.

The defendant, who is the only appellee, has moved to dismiss the appeal, on the ground that his warrantor was not made a party to it, and that if the judgment was reversed he would be deprived of the faculty which the law gives to a party evicted, of obtaining in the judgment of eviction, relief against his warrantor.

We have already said that a party who asks relief at our hands ought to cite before us all the parties to the judgment which he seeks to have reversed or amended, and which they have an interest to maintain. *Guerin et al.* vs. *Bagneris*, 9 *Louisiana Reports*, 471.

In that case, which was decided at May term, 1836, we refused the dismissal, but gave time to cite in the warrantors, because the question was new, and the members of the bar

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entertained much difference in opinion on that question. As that decision has long ago been published and is well known, we do not think ourselves authorized to grant the same indulgence.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

GORTON *vs.* GORTON'S EXECUTOR.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT FOR THE PARISH OF AVOYELLES, THE JUDGE OF THE SEVENTH PRESIDING.

If the clerk's certificate to the foot of the record, states that it contains "a transcript of all the proceedings had, *and all the evidence adduced* on the trial, this will be sufficient to sustain the appeal, without a certificate that the testimony was taken down in writing, at the request of one of the parties, to serve as a statement of facts, &c.

Where endorsed notes are taken at a probate sale, paraphed *ne varietur*, the executor may take out an order of seizure and sale, as against the maker and the property mortgaged, on the production of the *procés verbal* of sale, without making any proof of the endorsements on the note. The endorsers in such cases, are only considered in the light of sureties.

The purchaser at a probate sale, cannot retain the amount of his notes in discharge of a legacy from the decedent to his minor children, on the ground that he is entitled to receive it for them, and has the usufruct during his marriage with their mother. His debt to the estate is personal, and his claim to the legacy *in autre droit*.

This case comes up on an injunction obtained by the plaintiff, to stay an order of seizure and sale, taken out by the executor of George Gorton, deceased, on certain notes secured by mortgage. The plaintiff purchased three slaves at the probate sale of his deceased brother's estate, for the sum of one

thousand nine hundred and fifteen dollars, for which he gave his four several promissory notes for four hundred and seventy-eight dollars and seventy-five cents each, payable to the order of Robert A. Crain, and endorsed in blank by said Crain, and S. E. Cuny, and were paraphed *ne varietur*, and mortgage retained. When they became due and remaining unpaid, the executor obtained from the judge at chambers, an order of seizure and sale, on presenting his petition, with the *procés verbal* of sale, by the judge of probates, and the notes annexed, and was proceeding to sell the property.

The present plaintiff applied for and obtained an injunction to restrain the sale, and to have the order of seizure and sale set aside, on the ground that the testator had made a legacy of one thousand dollars to his minor children, which he had a right to compensate for the sum he was owing the estate of his deceased brother.

He further alleges, that the order of seizure and sale was illegally and irregularly obtained on said notes, and that it is null and should be set aside. He prays for an injunction, and that the order of seizure and sale be set aside, and the demand of his minor children for their legacy allowed, in compensation of the sums he owes the estate.

The defendant in injunction pleaded a general denial, and averred that the legacy of plaintiff's children could not compensate the debt he owed the estate in his own right; that there are other legatees. The property of the estate has been sold on long credits, and the debts are to be first paid, etc.

On these pleadings and issues the cause was tried.

The district judge rendered judgment perpetuating the injunction, and setting aside the order of seizure and sale, without prejudice to the ulterior rights of the defendant, and he appealed.

Winn, for the plaintiff.

Hyams and *Dunbar*, *contra*.

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Martin, J., delivered the opinion of the court.

The dismissal of the appeal is prayed for, on the ground that there is no statement of facts, etc., the clerk having neglected to certify that the testimony was taken down in writing on the trial, at the request of one of the parties, in order to serve as a statement of facts, as provided by the *Code of Practice, article* 601.

If the clerk's certificate to the foot of the record, states, that it contains "a transcript of all the proceedings *had, and all the evidence adduced* on the trial," this will be sufficient to sustain the appeal, without a certificate that the testimony was taken down in writing at the request of one of the parties to serve as a statement of facts, &c.

It appears to us the appeal ought not to be dismissed, because the clerk has certified that the record contains a transcript of all the proceedings had, and *all the evidence adduced* on the trial. *Code of Practice*, 896.

The defendant having obtained at chambers an order of seizure and sale, on the *procés verbal* of the judge of probates, of the sale of his testator's estate, to which was annexed the note of the plaintiff, with two blank endorsements, paraphed *ne varietur* by the judge, as given for the price of property purchased at said sale, he obtained an injunction to stay the order of seizure and sale, on the ground that the defendant had not proved, by an authentic act, the endorsement of the note ; so that it did not appear that the plaintiff had acquired the right of the person named, as the original payee in the note. The order of seizure and sale was set aside, the injunction made perpetual, and the defendant appealed.

Where endorsed notes are taken at a probate sale, paraphed *ne varietur*, the executor may take out an order of seizure and sale as against the maker, and the property mortgaged, on the production of the *procés verbal* of sale, without making any proof of the endorsements on the note. The endorsers in such cases are only considered in the light of sureties.

The court, in our opinion, erred. The judge had before him authentic evidence that the plaintiff's note was given to the defendant with two blank endorsements thereon, for the price of property purchased at the probate sale. The defendant therefore, was, in substance, the immediate payee and owner of the note, as the person to whose order it was made payable, was never intended to have (or actually had) the right of receiving its amount. This person and the other endorser intervened, only as sureties of the maker of the note.

The defendant might, if he had not seen proper to resort to an order of seizure and sale, have brought a direct action on the note against the maker, stating that he was entitled to receive its amount, not as endorsee but as owner, having

received it from the maker. In such a case as in the present, the verity of the signatures of the persons appearing as endorsers, would be an immaterial circumstance ; for even if they were forgeries, a recovery might be had.

The plaintiff has further urged, that the will of the defendant's testator, contains a legacy in favor of his minor children under the age of puberty, which he is entitled to receive for them, and of which he has the usufruct during his marriage with their mother ; and accordingly, the testator's estate being solvent, he ought to be permitted to retain the amount of the note in discharge of the legacy. It appears to us this cannot be allowed. The plaintiff's debt is a personal one, and his claim to the legacy *in autre droit*, and cognizable only by the Court of Probates. The District Court is without authority to enforce the payment of it. Neither does it clearly appear that the plaintiff could support his pretensions even in the Court of Probates. Every individual, and perhaps every estate, is, *prima facie*, deemed solvent ; yet no executor can, with safety, discharge, at once, a debt of his testator. He must wait until time be given for distant creditors to present their claims, in order that it may be established contradictorily with all who present themselves as creditors, that there is really a sufficiency of assets to pay all the debts. Legatees must wait until then, for they are to be paid only out of what remains after the creditors are all satisfied. An executor can disburse no money of the estate, without an order of the Court of Probates.

The purchaser at a probate sale cannot retain the amount of his notes in discharge of a legacy from the decedent to his minor children, on the ground, that he is entitled to receive it for them, and has the usufruct during his marriage with their mother. His debt to the estate is personal, and his claim to the legacy *in autre droit.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed ; and that the injunction be dissolved, and the order of seizure and sale reinstated ; the plaintiff and appellee paying costs in both courts.

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GINN *vs.* CLACK.

GINN
vs.
CLACK.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.

When there is not sufficient time to cite in the appellee by the *return day*, the clerk cannot alter the time by inserting a prolongation of the day of appearance in the citation. The day on which the party is cited must be the one fixed by the judge, and be expressly stated in the citation.

The appellee may file his motion to dismiss the appeal, at any time within three days after the day on which he is cited to appear; and this right he has, even if the record be filed sooner, and the cause set down for trial.

Where there was not time to cite in the appellee on the return day fixed by the judge, the appeal was, on his motion, dismissed.

This is a petitory action to recover a tract of land in the possession of the defendant. On trial, after the pleadings and issues were made up, and evidence adduced, the defendant had judgment, from which the plaintiff appealed.

Judgment was rendered the 25th of September, 1837, and an appeal was granted the 25th of September, 1838, returnable to the first Monday (1st day) of October following. Citations issued and were served on the appellee the same day. But the citation runs thus: "You are hereby cited to appear, &c., on the first Monday of October next, if twenty-four days shall remain between the time of service hereof and the said first Monday of October next, but if so many days shall not remain, then, in twenty-four days from and after the service hereof, *to answer to the said appeal.*"

M'Guire, for the defendant and appellee, moved to dismiss the appeal, for defect and irregularity in the return day and citation.

Martin, J., delivered the opinion of the court.

The dismissal of the appeal is prayed for in this case, on the ground that it was granted on the 25th of September, 1838, and made returnable to the 1st of October following.

The appellant has urged, that the irregularity of the

return day is cured by the citation, in which the appellee is cited to appear "on the first Monday in October next, if twenty-four days shall remain between the time of service hereof and the said first Monday of October, but if so many days shall not remain, then, in twenty-four days after service hereof," &c.

When there is not sufficient time to cite in the appellee by the *return day*, the clerk cannot alter the time by inserting a prolongation of the day of appearance in the citation. The day on which the party is cited must be the one fixed by the judge, and be expressly stated in the citation.

The Code of Practice, makes it the duty of the judge to state, at the foot of the petition, the day on which the appeal shall be returned; article 574. He did so in the present case, and we are ignorant of any authority in the clerk to substitute another return day to that which the judge has fixed. The day on which the party is cited to appear, must be expressly stated in the citation, and must be certain and not left to be ascertained by computation.

The law requires, that the appellee must be cited to appear at the next term, if there be sufficient time, after allowing the same delay which is granted to defendants in ordinary suits, and if not, to the subsequent term; *Code of Practice*, 583. This appeal was granted on the 25th of September: according to the calculation in the citation, twenty-four days were to be allowed from the service, to satisfy the delay of one day for every ten miles between the place of his residence and that on which the court is held, as well as the ten days allowed to defendants in ordinary cases to answer in. To these, ten more days ought to have been allowed for the time necessary to procure the citation from the clerk, put it in the hands of the sheriff, and to have service made; in all, about thirty-four days, which must have protracted the return day, to the 29th or 30th of October. As at this late date, the Supreme Court is not in session in the Western District, because it must necessarily adjourn on the 31st of the month; no proceedings could be had on the appeal, if returnable at this October term; it ought, therefore, to have been made returnable to the first Monday of the succeeding term.

The appellee may file his motion to dismiss the appeal, at any time within three days *after the day* on which he is cited to appear; and this right he has, even if the record be filed sooner and the cause set down for trial.

The counsel for the appellant has urged, that the appellee's motion to dismiss, cannot be heard, because it was not filed within three days after the record was filed, and not until the cause was set for trial. The Code of Practice,

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indeed, requires, that the appellee shall file his answer within three days after the time allowed him for appearance by the citation. In this case, the citation required him to appear on a day subsequent to the 20th of October, and the motion to dismiss was filed more than a week before. *Code of Practice*, 886. 2 *Louisiana Reports*, 300.

Where there was not time to cite in the appellee on the return day fixed by the judge, the appeal was, on his motion, dismissed.

If the cause had been regularly set down for trial, it is not clear that the appellee would necessarily be deprived of the right of dismissing the appeal; but it appears to have been set down before the day fixed in the citation for the appearance of the appellee. This cannot preclude him from filing his answer, or a motion to dismiss, for he had three days to do so, as the appellant admits, after the day of appearance.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

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APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.

Where there was not time to cite in the appellee, on the return day fixed by the judge, the appeal, on motion of the appellee, will be dismissed.

When there is not time to cite the appellee to the next term, the return day should be fixed for the first day of the succeeding term.

The appeal in this case was granted on the 21st day of September, 1838, and made returnable the 1st day of October following, leaving but nine days intervening, besides the travelling time of one day for every ten miles.

M'Guire, for the plaintiff and appellee, moved to dismiss

the appeal, because the return day was improperly fixed, and that the citation required the appearance of the appellee at a different day from that fixed by the judge.

Garrett, contra.

Martin, J., delivered the opinion of the court.

The only difference between this case and that of *Ginn* vs. *Clack*, just decided, is, that the appeal in this was granted on the 21st of September, 1838, while in that it was granted on the 25th of the same month. The citations in both fixes the same day of appearance to the appellee. The circumstance of the appeal in this case having been granted four days sooner than in the former, is unimportant, as the return day in both were improperly fixed in the judge's order, and in the citation of appeal. For the reasons given in the case referred to, of *Ginn* vs. *Clack*, the appeal in this case must be dismissed.

Where there was not time to cite in the appellee on the return day fixed by the judge, the appeal, on motion of the appellee, will be dismissed.

When there is not time to cite the appellee to the next term, the return day should be fixed for the first day of the succeeding term.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

BAILLIO ET AL. *vs.* INNIS'S EXECUTORS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF RAPIDES.

The general provision of law is, that "nuncupative wills under private signature," must be attested by five witnesses residing in the place, or seven residing elsewhere; but there is an exception in regard to this form of wills made *in the country*, that three witnesses residing in the place, or five elsewhere will suffice; *provided, that in this case a greater number cannot be had.*

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It must be shown, that a greater number than three witnesses could not be had; or if it appears that a greater number might have been had to a nuncupative will, under private signature, made in the country, it will be annulled for want of the legal formalities.

This is an action instituted by the legal heirs of Mrs. Ellen Innis, deceased, against her executors, to annul and set aside her last will and testament.

The plaintiffs allege that the will is null, for want of the essential formalities required by law, because it is not stated that it was dictated by the testatrix; of its having been read to her in the presence of the notary and witnesses, by whom it was written, and that it does not state all the formalities were gone through without interruption, and turning aside to other business; that the testatrix knew not how to write, yet no mention is made of her declarations to that effect, or the reasons for not signing her name; and, in fact, none of the formalities of law have been complied with, either in the making the will or admitting it to probate. The plaintiffs further state, that the will contains a substitution and *fidei commissum*, which is reprobated by law.

The plaintiffs further allege, that they are the brothers and sisters, and other heirs at law of the testatrix, and as such entitled to inherit her estate; that the executors have gone on to administer and take into their possession, all the property of said estate, and have rendered no account, and that no partition has been made thereof.

Wherefore, they pray that the executors and all those who claim under the will be cited; and that the said will and the probate thereof, be annulled and set aside as illegal and informal; that they be recognized as heirs, and the executors required to render an account of their administration, and the property of the estate; and that a final partition be made between all the legal heirs and representatives of the deceased, Mrs. Ellen Innis. Finally, that the executors be condemned to pay five thousand dollars damages, and thirty thousand dollars for the use, enjoyment, interest and profits of the said estate.

The defendants pleaded a general denial, and further

averred, that the will attacked in the petition is good and valid in law; and that they have a good and valid title under the will to all the property of the deceased, and which is claimed by the plaintiffs. They pray that the said will be confirmed and established.

Upon these pleadings and issues the cause was tried before the judge of probates.

THE WILL.—"I, Ellen Innis, do make and ordain this my last will and testament: first, to my beloved husband, Alexander Innis, I give and bequeath all my property, both real and personal, during his natural life; and at his death I give and bequeath the whole of my property, both real and personal, to my brothers, John L. Baillio and Auguste Baillio, to be equally divided between them, except two thousand dollars, which I give to John Westley, an orphan boy, whom I have raised, and who is at this time with me; the money to be put out at interest by my executors hereafter named, and be given to him when he arrives at the age of twenty-one years.

"Lastly, I nominate and appoint my beloved husband, Alexander Innis, and my brother, John L. Baillio, executors of this my last will and testament, hereby revoking all others, etc.

"In testimony whereof, I hereto subscribe my name, in presence of the undersigned notary public, and the three subscribing witnesses, who were called at my request, at Alexandria, this 5th May, 1827.

"ELLEN $\overset{\text{Her}}{\underset{\text{Mark.}}{\bowtie}}$ INNIS."

"Mrs. Innis not being able to write her name, I have done it at her request. "J. B. SCOTT.

"Done before me, - - J. B. SCOTT, *Notary Public.*

Witnesses.

"JAMES BOWIE,

"S. E. CUNY,

"J. B. HENNO.

"*Ne varietur.*" "J. H. J. *Parish Judge.*"

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BAILLIO ET AL. *vs.* INNIS'S EX'RS.

On the 17th November, 1834, the judge of probates for the parish of Rapides, states in his *procés verbal*, that Alexander Innis, one of the executors of Mrs. Innis's will, came into court, and requested that the last will and testament of Mrs. Ellen Innis, heretofore deposited in the office of the parish judge, etc., be opened, proved, and admitted to record; and the death of Mrs. Innis being proved, and the will opened, came Stephen E. Cuny, one of the subscribing witnesses to the will, who being duly sworn and examined in presence of J. B. Scott, notary public, deposes and says, he recognizes the testament presented to him, as being the same executed in his presence, by Mrs. Ellen Innis, by making her ordinary mark thereto; that he recognizes his signature as one of the witnesses to said will, as well as the signature of James Bowie, and J. B. Henno, the other subscribing witnesses, the former of whom resides out of the United States, and the latter is dead; and that the will was signed in their presence. The will was then read in a loud voice, and paraphed by the notary.

S. E. Cuny, one of the witnesses to the will, was called and sworn on the trial, and testified to the execution of the will, and to the signatures of the other witnesses, Bowie and Henno, who were dead; that the will was written and signed by the testatrix, on board of a steam-boat then lying at the town of Alexandria; that the steam-boat left a very short time after signing the will; that the will was read to the testatrix in the presence of the witnesses, and that she was unable to write at the time. Witness supposes the population of Alexandria in 1827, was between five and seven hundred, one half blacks; that there were from fifty to a hundred white men residing in Alexandria.

J. B. Scott, a witness, and who signed the will as a notary, says, Mr. and Mrs. Innis desired him to make their wills; that she wished to give her property to her husband during his life, and Mr. Innis wanted to give his to his wife during her life, with the exception of some donations; that Mr. and Mrs. Innis were on board a steam-boat in Red River, at the landing at Alexandria, on their way to the North;

that Mrs. Innis was unwell, and they both wanted their wills written immediately as the steam-boat was about starting. He wrote the will and read it to Mrs. Innis, in presence of the witnesses, who declared it to be her last will and testament. She, not being able to write, made her mark. Thinks they had some difficulty in getting the witnesses they did get. All the parole testimony was objected and excepted to by plaintiff's counsel, as inadmissible, against a written instrument, etc.

A plan of the town of Alexandria, was in evidence, to show the steam-boat lay out of the town limits, and that the will was made in the country.

Upon the whole evidence, the judge of probates was of opinion the will was good and valid as a nuncupative will, under private signature. Judgment was rendered, confirming and establishing the will, from which the plaintiffs appealed.

Winn and *Brent*, for the plaintiffs.

Dunbar, for the defendants.

Martin, J., delivered the opinion of the court.

The plaintiffs, heirs at law of Ellen Innis, deceased, are appellants from a judgment of the Court of Probates, which establishes her last will and testament. This instrument, to which the form of a nuncupative will by authentic act was attempted to be given, is admitted to be invalid as such, but it is contended, that it is good as a nuncupative will, under private signature. The principal objection, is, that it was subscribed by four witnesses only, one of whom was the notary. The appellee's counsel has contended, that three witnesses sufficed; and if more be required, they have shown that as the will was executed in the country, the impossibility or great inconvenience of obtaining them, forms an exception to the general rule.

The will appears on the face to have been executed in the town of Alexandria, and parole evidence has been introduced

to show that it was made on board of a steam-boat, moored at the landing before the town. Exceptions were taken to the admission of the parole evidence, but we have deemed it useless in deciding this case, to inquire into the admissibility of the evidence, because it has appeared to us immaterial to the issue.

The general provision of law is, that, "nuncupative wills under private signature," must be attested by five witnesses residing in the place, or seven residing elsewhere; but there is an exception in regard to the form of wills made *in the country, that* three witnesses residing in the place, or five elsewhere, will suffice; *provided, that a greater number cannot be obtained.*

Admitting that the steam-boat, while thus moored, was in the country, and not within the limits of the town, the will has been considered as made in the country. Its date is posterior to the promulgation of the Louisiana Code, which provides that nuncupative wills, under private signature, may be made in the presence of five witnesses, residing in the place, or of seven residing elsewhere. *Louisiana Code, article* 1574. There is, however, an exception, in regard to wills made in the country. There, three witnesses residing in the place where the testament is received; or five residing elsewhere will suffice, "provided, *that in this case*, a greater number of witnesses cannot be had." *Louisiana Code*, 1576.

The counsel for the appellees have contended, that the words, "*in this case*" relate only to a will, in which the witnesses reside out of the place. The appellant's counsel, on the contrary, urges, that these words relate to every will made in the country; in other words, that the same number of witnesses required to a will made in town, must be had to a will made in the country, unless such a number *cannot be had.*

The appellee's counsel has drawn our attention to the corresponding article in the Civil Code of 1808, page 228, article 98, in which the words "*in both cases*" are used, instead of the words, *in this case*, in the Louisiana Code, which excludes the extension of the *proviso* to a will having three witnesses. The article cited from the old code, treats of wills and codicils, and the words "*both cases*" relate to those cases in which a will or codicil is made. We, therefore, conclude, that there is no difference between a will made in town and in the country, as to the number of witnesses required, when that number can be had. This confines our inquiry to a mere question of fact, to wit: whether

a fifth witness to the will under consideration, might have been had.

One witness has deposed, that there was some difficulty in getting the witnesses which were obtained. There is not a tittle of evidence from which it may be inferred that any attempt was made to obtain more. Nor even that the notary, or any one else, thought that more were necessary; or that there was any intention of making any other will than a nuncupative will by authentic act. A notary was resorted to, and he took with him three witnesses, the number required by law, for a will of this kind. *Louisiana Code, article* 1571.

If a nuncupative will, by private act, had been intended, it is probable that it would have been easy to find on board of the boat, another witness, which, with the other three, and the notary, would have completed the number required for such a will, even if none could have been obtained in town. There is generally on board a steam-boat, a captain, mate, clerk, pilot and engineer, who, it may be supposed, are able to sign their names. If none of these could be had, and there were no passengers, any of the boat hands might have been taken, for it is not necessary that all the witnesses to a will should be able to write their names. It is difficult to assent to the proposition that the testatrix was alone on board, surrounded only by slaves or females, who cannot be instrumentary witnesses. We much more readily assent to the proposition of the appellant, that it having been discovered that the will wanted most of the legal formalities necessary for a nuncupative will by authentic act; an after thought occurred, to attempt to support it as a nuncupative will by private act, and for this purpose it has been endeavored to prove, that a greater number could not be had. In this, it appears to us, the appellees have failed.

It must be shown, that a greater number than three witnesses could not be had; or, if it appear, that a greater number might have been had to a nuncupative will, under private signature, made in the country, it will be annulled for want of the legal formalities

Our learned brother, in the Court of Probates, has expressed, and with great ingenuity supported a different opinion, but we have not been able to concur with him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and

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reversed; and that the instrument offered by the appellees, as the will of Ellen Innis, be rejected and set aside, and that the cause be remanded for further proceedings according to law; the costs of the appeal to be paid by the succession of the deceased.

PAIGE & WELLS *vs.* SCOTT'S HEIRS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

Where the owner of a tract of land gave permission to make "a race course" on it, saying to the plaintiffs "they might have the land ten years for nothing," or "as long as they pleased," but it does not appear that the owner was to derive any benefit from the improvement put on it; *Held*, that there was no lease, and the heirs of the late owner are entitled to the possession under their inheritance.

It is of the essence of the contract of lease, that a rent, or an equivalent, should be stipulated.

This is an action to enforce a verbal lease, or an innominate contract. The plaintiffs allege, that Judge Scott, the ancestor of the defendants, leased to them a tract of land, adjoining the town of Alexandria, for "*a race course*," to be used by them for the term of ten years, free of rent, for and in consideration of the improvements made, and to be made on the land, which were then worth four thousand dollars. That Judge Scott died, in August, 1834, without having made and executed a lease in writing; and, since his death, his widow and heirs have slandered their title, by denying the above lease was ever made to them, and have endeavored to deprive them of the benefit and use of it, to their damage five hundred dollars. They pray for judgment quieting them in their title and possession to the

land in question, for the term of their lease, and for their damages.

The defendants deny that the plaintiffs have any manner of title to the premises, either by lease, or otherwise. That they have illegally, and without any shadow of title, taken possession of the land, have cut down valuable timber, and made crops thereon, and are still cultivating the same, for which defendants claim damages in reconvention in the sum of five thousand dollars.

Upon these pleadings and issues, the cause was tried before the court and a jury.

M'Crummin, a witness for plaintiffs, says he made a survey of the ground and *race course*, and that he observed to Judge Scott, that as the plaintiffs would be at great expense, he ought to let them have a long lease; and Judge Scott observed they might have it as long as they pleased. They have occupied it since, and made considerable improvements on it. He made the survey the 3d April, 1834.

Mr. Chew, a witness on same side, says, having heard that Judge Scott had leased the space of ground called the *race course*, he asked him about it, who told witness, that one of the plaintiffs being his son-in-law, he let them have the land for ten years for nothing. They have since made considerable improvements on it. Thinks the labor and expense would cost four or five thousand dollars. If, after ten years, it should continue a race course, these improvements would make it more valuable. Thinks if he was the owner he could now rent it for fifteen hundred dollars.

Mr. Thomas has heard Judge Scott, several times, mention the making the lease, but did not mention the terms, that he recollects. Said he did not rent the land for cultivation, and would not.

The district judge charged the jury, "that article 2641 of the Louisiana Code did not exclude all other prices, or considerations, for the enjoyment of the property by lease, than those mentioned in this article. And, if they were convinced by the evidence that the plaintiffs were to have the enjoyment of the property in question, for ten years, and, as

the consideration of said enjoyment, they were to put certain improvements on it which would enhance the value of the property to the proprietor, such contract would be legal in itself; and, though not, perhaps, constituting what the jurists technically call a lease, yet it would be governed by the same rules; and they might, therefore, view it in that light, and give a verdict in favor of the plaintiffs, if such a case was made out to their satisfaction." This charge was excepted to by the defendants' counsel.

The 2641st article of the code says, "the price should be certain and determinate, and consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing hired."

The jury returned a verdict for the plaintiffs, confirming their lease for ten years, and that they be quieted in the enjoyment thereof. From judgment confirming the verdict, the defendants appealed.

Dunbar, for the plaintiffs.

Elgee, for the defendants.

Martin, J., delivered the opinion of the court.

The defendants are appellants from a judgment by which the plaintiffs are quieted in the use and possession of a tract of land, which they allege that they hold on a lease from the ancestor of the defendants.

The answer denies that the plaintiffs have any lease. They have not produced any written one, but they have proven by one witness that the defendants' ancestor told him, "that as one of the plaintiffs was his *son-in-law, he let them have the land ten years for nothing.*" Another witness deposed, that on his telling the defendants' ancestor that he "ought to let the plaintiffs have a long lease" of the tract, he replied, "*they might have it as long as they pleased.*"

There is not the least tittle of evidence that the defendants' ancestor stipulated for any rent, or any profit or advantage, for the use and occupation of the land. The plaintiffs

improved it as a *race ground*, and it is shown that they spent large sums of money in fitting it up as such. But it does not appear that the defendants' ancestor was to derive any benefit from these improvements, as the plaintiffs were not bound to leave them on the premises.

The plaintiffs have indeed shown, that they had the gratuitous permission to make use of the tract of land, as a race ground, but not that they had any lease of it. The jury, therefore, erred in concluding that the plaintiffs had a lease, it being of the essence of the contract of lease, that a rent, or an equivalent, should be stipulated. The judgment on this verdict is erroneous, and unsupported by law, and, consequently, cannot stand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that ours be for the defendants, as in the case of a non-suit, with costs in both courts.

WALTON *vs.* CATHOLIC CONGREGATION.

Where the owner of a tract of land gave permission to make "a race course" on it, saying to the plaintiffs, "they might have the land ten years for nothing," or "as long as they pleased;" but it does not appear, that the owner was to derive any benefit from the improvements put on it: *Held*, that there was no lease and the heirs of the late owner are entitled to the possession under their inheritance.

It is of the essence of the contract of a lease that a rent or an equivalent should be stipulated.

WALTON *vs.* CATHOLIC CONGREGATION.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE FIFTH PRESIDING.

The Church Wardens of the Catholic Congregation of St. Francis, were authorized to raise the sum of twenty thousand dollars, by lottery, and to draw as many as three classes; with the right to sell their privileges, which they did, to another person, who also sold his rights and privileges to F, who drew as many as twenty classes; *Held*, that there was no privity between the Church Wardens and F, and they were not liable for the payment of the prizes drawn under his management.

This is an action to recover half the prize of ten thousand dollars, drawn to a lottery ticket, No. 13, 10, 23, in a lottery

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drawn on account of the defendants, in New-Orleans, the 28th July, 1832. The plaintiff alleges, that in February, 1827, the legislature passed an act, conferring on "The Catholic Church of St. Francis, of Natchitoches, the power, and authorizing them to raise the sum of twenty thousand dollars, by lottery; and further authorized them to draw as many classes as were necessary, and to sell and dispose of the privileges granted by the act, to others, for money, who were, in like manner, authorized to draw said lottery, and that in pursuance of this authority, said church or congregation, did sell for a large sum of money, the privilege of drawing said lottery, to one Jean Baptiste Faget, of New-Orleans, who sold the ticket in question, being marked A, in class No. 20; that this ticket entitled the holder to such prize as should be drawn to its numbers, if demanded within twelve months, subject to a deduction of fifteen per cent.

He further shows, that he is owner of one half of this ticket, which drew the prize of ten thousand dollars, and that he has demanded payment of said Faget, who has failed to pay, even after being prosecuted to judgment.

He further shows, that the 4th section of the act authorizing the lottery, requires that "the *managers* should give security to the satisfaction of the governor, conditioned that they pay the prizes drawn to the numbers sold, which security the managers failed to give; that defendants did sell their right or privilege, either to Faget or some one else, who managed the lottery, sold the tickets, and had the lottery drawn; and whether the defendants sold their rights or not, is wholly immaterial, as a lottery was got up under the act empowering them to make a lottery, and Faget was manager, who sold tickets, and under their superintendence the lottery was drawn with their knowledge and consent, and they are liable in any court for the prizes drawn.

He further states, that said church or congregation, fraudulently neglected to appoint commissioners, and give the security required by the act authorizing the lottery; and that they are bound in law, and by the conditions of said act, as well as in justice and equity to pay the net proceeds

of said prize, or the one half thereof, amounting to four thousand two hundred and fifty dollars, for which he prays judgment.

The defendants pleaded a general denial, and averred that they were authorized by an act of the legislature, to raise the sum of twenty thousand dollars, by lottery, and that the third section empowered them to sell and dispose of the privileges granted them, and that in pursuance thereof, they did sell it; that they are in no manner responsible for the payment of the prizes drawn in said lottery, but that the persons who received the proceeds of the sales of tickets, and who gave security as the law required, are alone bound; that they have sold their privileges for the purpose of building a church, which they were empowered to do by this act.

Upon these issues and pleadings, the cause was tried. The following is the act of the legislature, authorizing the Catholic Church of St. Francis, of Natchitoches, to draw the lottery in question:

"*Be it enacted, &c.*, That the church wardens of the Roman Catholic Church of St. Francis, of Natchitoches, be authorized and empowered, and they are hereby authorized and empowered, to raise, by a lottery, the said sum of twenty thousand dollars, for the purpose of enabling them to erect and build a church, and the necessary edifices, for the use of said congregation.

"SECT. 2. *And be it further enacted*, That the said church wardens, shall choose three discreet persons, who shall act as managers or commissioners of said lottery, to make a scheme for said lottery, and sign and sell the tickets, and superintend the drawing thereof; to pay the prizes drawn therein; and they shall possess full power to do all things for the more complete execution of the objects contemplated by this act.

"SECT. 3. *Be it further enacted*, That the said church wardens are hereby authorized and empowered to sell, or in any other manner to dispose of the privilege and authority granted by virtue of this act, to any person or persons, on such terms as by them may be deemed most expedient.

"SECT. 4. *And be it further enacted*, That if the said sum of twenty thousand dollars, shall not be raised by said church wardens, by the first class of said lottery, the said church wardens are hereby authorized and empowered to commence and carry on a second and third class, until the before mentioned sum of twenty thousand dollars, be raised by said lottery; provided, that the managers of the said lottery, shall give security to the satisfaction of the governor, conditioned that they will pay the prizes that may be drawn in the said lottery, or return the money received for tickets, in case the same shall not be drawn in two years from the time they commence selling the tickets.

"SECT. 5. *And be it further enacted*, That the security required by this act, need not be given for the whole amount of the lottery, but that it shall be sufficient if good security be given to the amount of the whole prizes of such tickets in said lottery."

The evidence showed, that the church wardens sold and transferred to one J. F. Ribetti, for the sum of four thousand dollars, all the rights which they acquired under this act. Ribetti sold and transferred all the right he acquired, to one J. B. Faget, who proceeded to draw the lottery, in which the prize sued for was drawn, even to twenty classes. There does not appear to have been any security given by Faget. It was admitted the plaintiff had sued Faget, and prosecuted him to insolvency, without being able to recover any thing.

The jury returned a verdict for the defendants, and from judgment rendered thereon, the plaintiff appealed.

Brent and *Winn*, for the plaintiff.

1. In this case plaintiff contends, that a special trust was reposed in the congregation by the act of 1826; that this trust was subject to certain restrictions and provisions, and unless they have been complied with, the responsibility of the congregation still continues. It is true that the act gives the congregation the power to sell their privilege, but this power, if exerted, certainly cannot absolve them from the obligation to see that all the requirements of the act are ful-

filled. In the framing of the act, the legislature knew no other party than the defendants in this suit, and of course expected no one else to comply with the conditions therein imposed. If, therefore, they have failed in this respect, they are still to be held responsible.

2. In the 4th section of the act, the legislature required that security should be given to the satisfaction of the governor, that the prizes should be paid, or the money returned in case the lottery should not be drawn in two years. The evidence establishes that this security was *not* given. We, therefore, hold the congregation answerable for a manifest dereliction of duty.

3. If the privilege had not been sold, and if the congregation had proceeded to draw the lottery, there could have been no doubt, but what they acted illegally in not furnishing the required security, for so careful was the legislature that the people should not suffer from this species of licensed gambling, that it exacted security from a *religious* and *wealthy* corporation. Now can it be supposed, that upon a transfer of such a privilege from such a body, to perhaps a needy and irresponsible adventurer, that the legislature conceived that all necessity for security had ceased to exist, and withdrew the assurance which it had given the public, when the lottery was under the superintendence of the church. Such a construction would bring us to the absurdity of supposing that the legislature required security where none was needed, and voluntarily relinquished it, where it was all essential. If the corporation had have exacted security from the purchaser, they would have gratified the law and would not be responsible. Our recourse would have then been against the security.

4. In a case of this kind, a power to sell, must be construed into a power only to sell the profits. See 12 *Wheaton's Reports*, 40. This is the only construction which can comport with right and justice.

5. The title of the lottery which was actually drawn, was the Natchitoches Church Lottery. It purported to be one belonging to a religious corporation, and its proceeds to

be applied to religious purposes. Many were doubtless induced, from this circumstance, to purchase tickets, and many more, perhaps, were induced to do so from seeing in the act, that security for fair dealing was required to be given to the satisfaction of the governor. But if they were deceived in both of these respects; if it was not the Natchitoches Church Lottery, although called so; and if that provision as to security is to be a dead letter, then there has been a gross and iniquitous fraud practised upon the people.

Dunbar, for defendants.

The catholic congregation sold their privileges in this lottery, as they were authorized to do by the act of incorporation. It was the duty of the purchaser, who stood in their place, to have managers appointed, and security given. If he has failed to do this, the congregation are not responsible; by the purchase, he took upon himself all the obligations of the congregation, as if they had drawn the lottery themselves. In no case were they to give security; it was only the managers who drew the lottery.

2. If the congregation were ever responsible, that liability is gone, as prescription has run in their favor. *Louisiana Code*, 2294–95, 3501. 6 *Martin, N. S.*, 669. 2 *Kent's Commentaries*, 299. 6 *Peters's Condensed Reports*, 439. 5 *Peters*, 395.

3. The act of the legislature did not authorize the drawing of more than three classes, whereas the ticket sued on purports to have been drawn in class number twenty.

Bullard, J., delivered the opinion of the court.

The plaintiff sues to recover of the corporation the amount of a prize drawn by him, in the 20th class of a lottery authorized by an act of the legislature, for the benefit of the latter. He alleges, that he purchased the ticket of one Faget, who, failing to pay the prize, was sued by him, and a judgment recovered, but which has never been satisfied. He further alleges, that the corporation fraudulently neglected to appoint commissioners, and to give the security required

by the act of the legislature authorizing the lottery, and, thereby, as well as by justice and equity, became liable to pay him the prize. The plaintiff, in a supplemental petition, further alleges, that the corporation sold their privilege, but that the lottery was got up under the management of Faget, and was drawn with the knowledge and consent of the defendants, who are, nevertheless, liable for the prize to which his ticket was entitled.

The defendants answered by admitting that they had been authorized by the legislature to raise twenty thousand dollars by lottery: but that they were authorized by the same act, to sell, or otherwise dispose of the privilege thus granted, and that they did sell their privilege, but not to Faget, and they deny their liability to pay. They further plead the prescription of one year.

The facts of the case are not contested. The defendants sold their privilege to one Ribetti, who afterwards sold it to J. B. Faget, of whom the ticket was purchased, in the 20th class of the church lottery, and drew one half of the capital prize of ten thousand dollars.

The act of the legislature in question, authorized the church wardens to raise by lottery, the sum of twenty thousand dollars, for the purpose of building a church, and other necessary edifices, for the use of the congregation. It was made their duty to appoint three discreet persons, as managers, to make a scheme for said lottery, and sign and sell the tickets, and superintend the drawing, and pay the prizes, with full powers to do all things for the more complete execution of the objects contemplated by the act.

It was further provided, that if the sum of twenty thousand dollars should not be raised by the church wardens, by the first class of the lottery, they should be authorized to "commence and carry on a second and third class, until the before mentioned sum of twenty thousand dollars should be raised," provided, that the managers should be required to give security, to the satisfaction of the governor, that they would pay the prizes, &c. The third section of the act authorized the church wardens to sell, or otherwise dispose of the privilege

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WALTON *vs.* CATHOLIC CONGREGATION.

The church wardens of the Catholic congregation of St. Francis, were authorized to raise the sum of twenty thousand dollars by lottery, and to draw as many as three classes, with the right to sell their privileges, which they did to another person, who also sold his rights and privileges to F, who draws as many as twenty classes; *Held*, that there was no privity between the church wardens and F, and they were not liable for the payment of the prizes drawn under his management.

and authority granted by the act, to any person or persons, on such terms as by them might appear most expedient.

It has been contended, on the part of the defendants, that it was the managers who should be appointed by them, in the event of their proceeding to draw a lottery, for their benefit, and at their risk, who were to give the security required by the act, and that having sold their privilege, as they were authorized to do, they were not bound either to appoint managers, or to cause them to furnish security. It does not appear to us that there was any privity between the church wardens and Faget, of whom the ticket was purchased. They transferred all their rights and privileges under the act of the legislature, to Ribetti, subject to the conditions and restrictions contained in that act, and he sold to Faget, subject to the same restrictions. It was clearly not the duty of the church wardens to require of Faget to furnish security to the satisfaction of the governor, inasmuch as he was neither their agent, nor their transferree. There is certainly no evidence to show any fraudulent neglect on the part of the church wardens, to appoint commissioners, and to give the security required, as alleged by the plaintiff in his petition. They did nothing more than they had a right to do, in selling their privilege, subject to its legal restrictions.

There is also great force in the objection, that the act authorized but three classes of the lottery, and that the ticket in question purports to have been one in the twentieth class. The church wardens were authorized by the act to raise twenty thousand dollars, by a lottery, and if that sum should not be raised by the first class, they were authorized to commence and carry on a second and a third class, until that sum should be raised, &c. This right to draw even a second class, depended on the condition that the sum contemplated to be raised had not been realized by the first. The words of the act do not appear to us to authorize more than three classes.

The case against the corporation of Washington, cited in argument, was decided upon different principles. That cor-

poration appears to have been rendered liable, on the ground that Gillispie was acting under them in drawing a lottery, in pursuance of a general authority conferred by the city charter. In the present case it does not appear that Faget held himself out to the world as the agent of the church wardens, or as a manager appointed or authorized by them. Persons purchasing tickets from him had an opportunity to inquire into his rights. He had purchased of Ribetti, by notarial act, passed before Carlile Pollock. It would have been discovered that the church wardens had parted with all their rights, and that, as he was in no manner subjected to their control, the purchasers of tickets must look to him for the payment of the prizes drawn.

This view of the case renders it unnecessary to notice the plea of prescription.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MARTIN *vs.* JETT.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

Where two estates are situated adjacent to each other, the one below owes to the other a natural servitude, to receive the waters which run *naturally* from it, provided the industry of man has not been used to create that servitude.

The owner of the superior estate, cannot make on his own land any works which would change the natural passage of the water upon the one below, owing the servitude, by collecting it upon a single point and giving it thereby a more rapid current, &c.

The owner of the superior estate may, nevertheless, make any work useful and necessary to agriculture, as furrows in a field, &c., or even ditches;

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not for the purpose of making the water flow upon the adjacent land, but for the purpose of improving and cultivating his land, and making it more healthy. He is not, however, to ameliorate his own land to the injury of his neighbor.

This is an action for damages occasioned by the defendant's stopping up the drains of his plantation, and to have the same kept open.

The plaintiff alleges, that he is the owner and occupant of a plantation fronting on Red River, and bounded below by the plantation of the defendant; that within a year past the latter illegally and unjustly erected a dam across a drain common to both, but on the edge of his own, and thereby obstructed the natural flow of the water from the petitioner's land through that of the defendant, into a certain bayou below, where it had always been accustomed to flow; that, by reason of the illegal conduct of the defendant, he has caused a considerable quantity of his (petitioner's) land to be overflowed, whereby he has sustained damage to the amount of five thousand dollars. He prays judgment for his said damages, and that the defendant be required to demolish his dam, and his obstruction to the drain of the water from his plantation.

The defendant pleaded a general denial; and avers, that instead of injuring the plaintiff, the latter had caused him much damage and injury, by digging ditches, and throwing the water on his arable lands, to his damage five thousand dollars, for which he prays judgment in reconvention, and that the plaintiff be condemned to stop up his ditches, &c.

Upon these pleadings and issues, the cause was first tried by a jury, who returned a verdict upon the evidence exhibited, for the plaintiff, in the sum of three hundred dollars in damages, and that the obstructions of the defendant be removed by him.

A new trial was granted on the application of the defendant.

On the second trial a jury was waived. The district judge gave judgment for the plaintiff. He remarked, "that

the fact was well established, not only by the testimony, but was shown from the formation of the country, that the general surface of the defendant's plantation and land is lower than that of the plaintiff, which is caused by the current of the river on one side and a bayou on the other; (shown by a diagram on file.) When there was any large accumulation of water on the land of the plaintiff, the surplus flowed upon the land of the defendant, even before any impediment was made by either.

"This being the case, it is clear, according to the provisions of the Louisiana Code, the defendant could not raise any embankment, as he has done, above the natural surface, to prevent the waters from flowing in this direction, and thereby reflow back on the plaintiff." *Louisiana Code*, 656; *Nap. Code*, 640.

"The defendant complains, that the plaintiff committed the first wrong by collecting the water on the surface of his field, by means of ditches and drains, and sending it down more suddenly on him below, and rendering the natural servitude more onerous and burthensome, contrary to a provision in the same article of the Code."

On the whole, the district judge came to the conclusion that the plaintiff had about five or six acres of cotton injured by the embankment, worth one hundred and forty dollars, for which judgment was rendered, and that the obstruction to the drain and flow of the water, be cleared.

The defendant appealed.

Dunbar, for the plaintiff.

Winn, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff seeks to recover damages from the defendant, for illegally erecting a dam or embankment on his land adjoining that of the plaintiff, whereby the natural flow of waters has been obstructed, and his land has been overflowed. The defendent, in answering, denies that he has

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done any thing to the injury of the plaintiff, but alleges, that the plaintiff, on the contrary, has done him great damage, by cutting artificial drains or ditches, on his adjoining tract of land, by means of which his arable lands are overflowed; and he claims damages in reconvention. There was judgment for the plaintiff, and the defendant appealed.

Where two estates are situated adjacent to each other, the one below owes the other a natural servitude, to receive the waters which run *naturally* from it: provided, the industry of man has not been used to create that servitude.

The parties are owners of adjacent tracts of land, and it is clearly shown, that the defendant's tract, which is situated below, owes a servitude to that of the plaintiff, to receive the waters which run naturally from it. The nature and extent of this servitude is clearly defined by the code; it is to receive the waters which *naturally* flow from the estate situated above, provided the industry of man has not been used to create that servitude; the proprietor below is not at liberty to raise any dam, or make any other work to prevent this running of the waters, and the proprietor above can *do nothing* whereby the natural servitude may be rendered more burdensome. *Louisiana Code, article* 656.

If we were to take this last clause in its strict literal sense, no doubt would remain on our minds but that the plaintiff, by cutting numerous ditches on his land, leading to a central reservoir, had greatly aggravated the servitude due by the adjoining estate. By means of such canals, the waters which would otherwise remain stagnant, in several ponds in different parts of the tract, or gradually flow on to the defendant's land, exposed to evaporation, when spread over a wider surface, are collected, and poured in a mass upon his neighbor, and during heavy rains might seriously injure his crop.

But it is contended, that although our code contains no explanatory article, similar to that in the Code Napoleon, which, in controversies like the present, directs the tribunals to decide in such a manner as to reconcile the respect due to property with the interests of agriculture, yet such ought to be the interpretation of the article in question.

Let us see to what extent the corresponding article in the Code Napoleon, has been thought, by able jurists in France, to authorize any artificial works, by which the servitude

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might be rendered more onerous, with a view of favoring the great interest of agriculture.

Duranton, to whose work our attention has been directed, in commenting upon the 640th article of the Napoleon Code, which forbids the owner of the superior estate to do any thing which might aggravate the condition of the inferior one, says, "Thus, he cannot make on his land any works, which would change the natural passage (immission) of the waters upon the inferior estate, either by collecting it upon a single point, and giving it thereby a more rapid current, and more apt to carry down sand, earth, or gravel, upon the land, or by directing upon a point on the same land a much greater volume of water than it would have received without such works," and he cites *Book* 1 *of the Digest, section* 1. 1 *Duranton, No.* 164.

The owner of the superior estate, cannot make on his own land, any works which would change the natural passage of the water upon the one below owing the servitude, by collecting it upon a single point and giving it thereby a more rapid current, &c.

But the same author proceeds to say, that the owner of the superior estate may make any work upon it necessary, or simply useful to the cultivation of his land, such as furrows in a planted field. He may, also, in planting vines, or forming a meadow, make ditches for the irrigation of the meadow, or for the purpose of rendering his vines more healthy and vigorous. *Ibid, No.* 165.

We are by no means disposed to give to the code such an interpretation as would, in effect, condemn to sterility the superior estate. That every man has a right to clear and cultivate his land, cannot be doubted. The clearing of land, and fitting it for agricultural purposes, is not calculated to render this kind of servitude more onerous. On the contrary, lands, it is well known, become more dry by being cleared, because evaporation goes on more rapidly. But it is one thing to clear and cultivate arable lands, and another thing to reclaim lands naturally covered with stagnant waters, in such a way as to throw the mass of water, which would naturally remain in pools or ponds, upon the lands of one's neighbor, situated below. The Roman law, which, perhaps, forms the best anticipated commentary upon this part of our code, permitted ditches to be cut by the superior owner, not for the purpose of making the waters flow upon

The owner of the superior estate, may, nevertheless, make any work useful and necessary to agriculture, as furrows in a field, &c., or even ditches, not for the purpose of making the water flow upon the adjacent land, but for the purpose of improving and cultivating his land, and making it more healthy. He is not, however, to ameliorate his own land to the injury of his neighbor.

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the adjacent land, but for the purpose of improving, by cultivation, his land, and making it more healthy; and laid down the equitable rule, that he ought not to ameliorate his own land to the injury of his neighbors. "*Sic debore quem meliorem agrum facere, ne vicini deteriorem faciat.*" *Digest, law* 1, *section* 4.

Tested by these principles, and according to the evidence in the record, we find it difficult to concur in the conclusion to which our learned brother in the district court has arrived, that the canals dug by the plaintiff on his land were only such as he had a right to make, for the purposes of cultivation, nor are we enabled to say whether the dam constructed by the defendant, to counteract the injurious effects of such works upon his land, be more than adequate to that purpose. While, therefore, we express our regret, that such a controversy should not be settled by amicable compromise, in such a manner as to reconcile the interests of the parties, we are bound to say, that in our opinion, justice requires the case should be remanded for a new trial.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be avoided and reversed, and, that the case be remanded for a new trial; the costs of the appeal to be borne by the plaintiff and appellee.

BAILEY *vs.* SMITH.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

Where the plaintiff's death was suggested, after issue joined, and an order of revival was made in the name of his widow, who was his administra-

trix, and his legal representative, which order was duly served by the sheriff: *Held*, that there was no need of citation to issue, as the representative had full notice of the suit.

If the plaintiff dies after issue joined, a citation is unnecessary, as that would be the commencement of a suit, which does not abate in this case. No judgment by default is required, because issue was already joined.

The demand of the plaintiff, and the plea in reconvention, should be determined by the same judgment; so, where the plaintiff dies after a reconventional demand is put in by the defendant, the case will not be transferred on that account to the Probate Court, but may be acted upon partly as compensation in reducing the plaintiff's claim, and partly as a judgment against him in reconvention.

This is an action to recover the price of a house and lot, which the plaintiff alleges he sold to the defendant, for the sum of four hundred and seventy dollars, with ten per cent. interest, from the 18th October, 1831. The interest to be paid by annual instalments, and the principal at the option of the purchaser, but the vendor retaining his mortgage until payment.

He further shows, that Smith has absconded from the state, and left no known agent; wherefore, he prays that a curator *ad hoc*, be appointed to represent said absentee; that he have judgment for the sum of four hundred and seventy dollars, with the interest due thereon, and that said property be seized and sold to pay the same.

The curator *ad hoc* pleaded a general denial; and he further avers, that there was on said lot, a very commodious house, which was worth seven or eight hundred dollars, and which would have rented for twenty dollars per month; but that after Smith had left this parish, the plaintiff illegally and violently entered upon said lot, and sold and caused the house to be pulled down and carried off, which was the property of the defendant, to his injury and damage, two thousand dollars, which he pleads in reconvention; and prays that he may be quieted in his possession and title to

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the said lot of ground, and have judgment against the plaintiff for two thousand dollars. After the cause was thus at issue, Bailey died. At the November term, 1836, the death of the plaintiff being suggested, it was ordered that this suit be revived in the name of the heirs and legal representatives.

A copy of this order was served on Mrs. C. B. Bailey, the widow of the plaintiff, and administratrix of his estate.

In this situation the cause remained until April term, 1838, when it was called for trial. It was submitted to a jury, who, on the evidence before them, returned a verdict for the defendant, and also allowing him two hundred and thirty dollars damages in reconvention. The administratrix, by her counsel, then for the first time appeared and filed a motion for a new trial, and in arrest of judgment, on the ground, to wit: that since the institution of this suit the plaintiff had died, and that she is duly appointed administratrix of his estate, but has never made herself a party to the suit, nor has his heirs, in the manner required by law; and that the case has been tried without any issue between the plaintiff's legal representatives, and the defendant, who has obtained a verdict for damages in reconvention. She prays that a new trial be granted, in order that she may legally become a party. This motion was overruled. Judgment was rendered confirming the verdict, from which the administratrix appealed.

Dunbar, for the appellant, contended, that there was error on the face of the proceedings. The widow and heirs were never cited in and made parties to the suit, nor was any issue made up as against them, nor judgment by default taken.

2. The judgment is erroneous as being rendered without proper parties, and should be reversed, and the case remanded for a new trial.

Elgee, for the defendant, insisted, that the order of revival was made in the usual manner, and had been duly served by

the sheriff on the administratrix of the deceased. *Code of Practice*, 120.

2. When a party dies after issue joined, the suit does not abate, and it is not necessary to recommence the action. No citation is then necessary to bring the representative of the deceased plaintiff into court. Notice of the order of revival is sufficient. *Code of Practice*, 361.

Martin, J., delivered the opinion of the court.

The plaintiff sues for the price of a lot of ground, and on his suggestion that the defendant was an absentee, a curator *ad hoc* was appointed to defend him. The answer of the curator *ad hoc* states, that Smith, the defendant, repaired a dwelling house on the lot, and that the plaintiff, in his absence, entered on the premises and sold the house, which was worth more than the price for which the lot had been sold.

The general issue was also pleaded, and the answer concluded by a plea in reconvention for damages occasioned by the unlawful conduct of the plaintiff, in thus entering on the premises and disposing of the house.

The plaintiff having died, and the administration of his succession being committed to his widow, she was made a party to the suit. There was a verdict and judgment for the defendant who was quieted in his possession, and two hundred and thirty dollars were allowed him on his plea of reconvention. The administratrix appealed.

Her counsel assigns as error, on the face of the record, that judgment was rendered against her without citation, and when there had been no judgment by default, and when no revival of the suit after the death of the plaintiff, in the name of his heirs and legal representatives had been legally ordered and carried into effect.

At the November term, 1836, of the District Court, the death of the plaintiff having been suggested, it was ordered that this suit be revived in the name of his heirs and legal representatives. A copy of this order was served on the administratrix, by the sheriff.

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Where the plaintiff's death was suggested after issue joined, and an order of revival was made in the name of his widow, who was administratrix and his legal representative, which order was duly served by the sheriff: *Held*, that there was no need of citation to issue, as the representative had full notice of the suit.

If the plaintiff dies after issue joined, a citation is unnecessary, as that would be the commencement of a suit, which does not abate in this case. No judgment by default is required because issue was already joined.

The demand of the plaintiff and the plea in reconvention, should be determined by the same judgment: so, where the plaintiff dies after a reconventional demand is put in by the defendant, the case will not be transferred on that account to the probate court, but may be acted upon partly as

When the cause was called at the April term, 1838, for trial, and after the jury brought in their verdict, the administratrix, who does not appear to have been in court before, appeared and moved for a new trial, on the ground that she had not made herself a party to the suit, and that it had been tried without any issue having been made between herself as administratrix, and the defendant.

The record shows, that an order was made for the revival of the suit, which was served on the administratrix, who was the legal representative of the deceased. There was no need of a citation, for the deceased was the plaintiff, and the representative was brought in, in that capacity. It was sufficient that she had notice of the suit, and of the order of revival. The citation is the commencement of a suit; and the Code of Practice, article 361, expressly provides, that "if, after issue joined, either the plaintiff or defendant dies, it is not necessary to re-commence the action." No judgment by default was necessary, because issue was already joined.

On the merits, nothing shows that the verdict of the jury ought to be disturbed. We have doubted whether that part of the case which relates to the reconventional demand, ought not to have been transferred to the Court of Probates, on the death of the original plaintiff, whose estate was in a course of administration in that court. The original defendant had become plaintiff in the reconvention, and raised a claim for money against the estate, of which the Court of Probates has exclusive jurisdiction. We have considered that the Code of Practice requires that the demand of the plaintiff and plea of reconvention, should be determined by the same judgment; and that in the present case, the reconvention was offered, and acted upon by the jury, partly as a compensation reducing the claim of the plaintiff, and partly as a demand for judgment against him for the balance. The plea of reconvention was properly acted upon in the District Court, as a matter of compensation, and so far, could not have been transferred to the Court of Probates. It would have been incongruous to split the reconvention into two parts, to be acted upon in two courts. This reason,

added to the requisitions of the Code of Practice, that there should be but one judgment on the original demand and the reconvention, has led us to the conclusion, that the District Court correctly acted on both.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

compensation in reducing the plaintiff's claim, and partly as a judgment against him in reconvention.

STATE OF LOUISIANA *vs.* NORMENT ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

The majority of the court were of opinion, that the district attorney had the choice of remedies, and could proceed against sureties in bail bond, by ordinary suit, and waive the summary mode of proceeding, under the statute of April 2, 1835. The state may select any legal means of instituting suit, which individuals may resort to.

Where the sureties on bail, produced the principal on the day, and when called, according to the tenor of their bond, who was arraigned, tried, and found guilty by the jury, on two indictments, and afterwards *disappeared; Held*, that the sureties were *not discharged*, because the bond stipulated, that "the principal shall appear at court, *and not depart thence without leave of the court*, which was not obtained in this case.

When the forfeiture of a bail bond has become a matter of record, it may be put in suit in the ordinary way, and perhaps in no other.

Bullard, J., dissenting. When there is a summary as well as an ordinary remedy provided by law, the party may resort to either at his option; but in no case ought this option to be permitted, when the law has pointed out a specific remedy, and a resort to another would deprive the defendant of any advantage, and render his condition more onerous.

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It is not so clear, that when the body of the *accused*, is produced by the bail, and notice given to the district attorney, the bail is not exonerated, without any formal *exoneratur* being entered. According to the English authorities, such would be the effect of a surrender by the bail.

This is an action, instituted by the district attorney, on behalf of the state of Louisiana, on the following bail bonds against the sureties therein.

"Know all men by these presents, that we, C. W. Jackson, as principal, and James Norment and W. K. English, as sureties, are held and firmly bound unto E. D. White, governor, etc., etc., in the sum of three thousand dollars, for the true payment of which we jointly and severally bind ourselves, etc., this 22d December, 1835.

"The condition of the above obligation is such, that if the said C. W. Jackson, who now stands charged, and has been committed to the prison of the parish of Rapides, for having resisted the deputy sheriff of said parish, in the execution of legal process, *shall be and appear at the next term of the District Court*, to be holden in and for the parish and state aforesaid, on the third Monday in April next, to answer said charge, *and not depart therefrom without leave of said court*, then and in that case, the above obligation to be null and void, etc.

"C. W. JACKSON,
"JAMES NORMENT,
"WM. K. ENGLISH."

Another bond of the same tenor and date, in the penalty of five thousand dollars, which states "that the principal (C. W. Jackson) stands charged, and has been committed to prison, etc., for having resisted C. D. Goodwin, C. M. Calvit, and C. B. Curtis, in the execution of legal process, and for having assaulted and beaten the said Goodwin, Calvit and Curtis; and for having forcibly and falsely imprisoned C. M. Calvit, and C. B. Curtis, etc." shall be and appear at the next term of the District Court, on the third Monday in April next, to answer such of the foregoing charges, as may be preferred against him, the said C. W. J., by the grand

jury, etc., *and not depart thence without leave of said court, etc.*"

The district attorney alleged, that the condition of said bonds were broken, by the non-appearance of the principal, (Jackson,) and that they were forfeited, and the sureties become liable. He prays judgment against the sureties, Norment and English, for the amount thereof.

The defendants pleaded that the action could not be maintained, because the statute of the 2d April, 1835, prescribes the only mode by which the district attorney can proceed to obtain judgment against bail, and this is not the mode prescribed.

2. That on the 2d day of the April term, 1836, they were called according to said act of 1835, to produce the said C. W. Jackson, in court, and that in obedience to said call, they did produce said Jackson, *instanter*, in open court, and that they informed the court at the time, that by so doing, they were discharged from all liability, on the recognizance sued on, etc.

3. That the grand jury found bills of indictment against said Jackson, and at a late day of the term, he was duly arraigned on all of them, and actually tried and found guilty on two of them by the jury; that he was tried immediately on his arraignment, on said indictment, and was in open court during all the first trial, and that he remained in court the greater part of his second trial; was in court when the jury returned a verdict of guilty, and remained there after his conviction, for more than twelve hours, etc. For these reasons, they deny any liability under the bonds sued on, and pray to be dismissed with costs.

The facts of the case show, that at the term of the District Court, to which the parties were required to appear, *on being called*, the sureties brought Jackson, the principal, into court, according to the tenor of the bail bonds, who was arraigned, tried, and convicted by the jury, on two indictments, and before sentence was pronounced, he disappeared, and has not been retaken so as to be brought into court. The sureties thought they had complied with their obliga-

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tions, by producing the principal, when *called at the term* of the court, to which they were recognized to appear.

At a late day of the term, when it appeared that Jackson had left the court house, and on being called failing to appear, a rule was taken against him and his sureties, to show cause, if any they could, why the recognizance or bail bonds, should not be forfeited; but no proceeding seems to have been had.

The present suit was brought to the next term of the court, in the form of a civil action on the bonds.

The district attorney relied on the tenor of the bail bonds, and the non-appearance of Jackson, after he was tried and found guilty by the jury; and the failure of the sureties to produce him, to show a forfeiture in order to recover.

The sections of the act of the 2d April, 1835, providing the mode of proceeding against sureties in bail bonds, and repealing the former law, are as follows:

"That the first section of the act to which this is a supplement, be, and the same is hereby so amended, that instead of the ten days notice, provided for by said section, it shall be the duty of the several district attorneys, in their respective districts, on the second day of each regular term of the district courts, (leave of the court first had and obtained) to call all persons, who may have entered into any bond, recognizance, or obligation whatsoever, for their appearance or their attendance at court, and also to call on the security or securities, to produce *instanter*, the person of such defendant or party accused, and upon failure to comply therewith, on motion of the district attorney, the court shall enter up judgment at *nisi* against both principal and security, according to the tenor of the bond, recognizance, or obligation; *Provided*, however, that said judgment may be set aside, at any time during the term, upon the appearance of the defendant, or party accused, and motion to that effect.

"SECT. 2. *Be it further enacted, etc.*, That it shall be the duty of the clerk to issue as many certified copies of such judgment, within ten days after the adjournment of the court, as there may be parties, with one original, and shall

deliver the same to the sheriff of the parish, if the party has his domicil in the parish where the court is held, or to the sheriff of the parish where the party or parties may reside; *Provided*, the party or parties have a residence in the state, but if the party or parties have no known place of residence in the state, then the service shall be made on the attorney *ad hoc*, which the court shall appoint to represent the absentees, and after having served the same, the sheriff shall make due return thereof to the clerk.

"SECT. 3. *Be it further enacted, etc.*, That on the second day of the next regular term thereafter of said court, or at any time during said term, (upon proof being made of the service as provided for in the second section of this act, and upon the party or parties failing to show good and sufficient cause,) said judgment shall, and it is hereby made the duty of the court to make final, and which may be executed, so soon as the minutes are signed, if the amount be under three hundred dollars, and if above that sum, in ten days thereafter, without any notice being given of said judgment; any law to be contrary notwithstanding."

The district judge was of opinion, that from the tenor of the bail bonds, the sureties were bound to produce the principal from day to day, until they were discharged by the court; and the principal having absented himself before this leave or discharge was obtained, the sureties were liable. Judgment was rendered against them and they appealed.

Brewer, (*district attorney*,) for the plaintiff.

1. The sureties of Jackson were not released by his appearance, when called on the second day of the term of the court. The act of 1835, made it the duty of the district attorney, to have all parties bound for their appearance at court, called out on their recognizances on the second day of the term, and in case they failed to appear, to have a judgment *nisi* entered; but if the parties appeared, when called, no law or practice authorized the district attorney to pray them into custody.

2. The appearance of Jackson, on a subsequent day of the

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term, and pleading not guilty to two of the indictments, did not discharge his sureties from their liability. He afterwards failed to appear to abide the judgment of the court in these cases, and there were two other indictments preferred against him by the grand jury, to which he has never pleaded. His sureties were bound by the tenor of their bonds not only for his appearance at court, but that he should not depart without leave of the court. His departure without leave of the court, was, therefore, a forfeiture of the bond. 1 *Chitty, page* 105. *Com. Dig. Bail, letter O*, 2.

3. The ordinary suit instituted in this case for the recovery of the bonds, is proper. The act of 1817, made it the duty of the attorney general, and several district attorneys, to prosecute and sue in all cases in which the state should be interested. 1 *Moreau's Digest, page* 27. Under this act no other mode was known than the ordinary mode of petition and citation. The act of 1818, provided that bonds and recognizances might be recovered upon motion, and notice to the parties; but did not take away the right to pursue the ordinary mode by petition and citation. 2 *Moreau's Digest*, 386. The act of 1835, only provides for the recovery of bonds due the state, in certain cases, viz: when the parties failed to appear on the second day of the term of court. This act leaves the act of 1817, unrepealed. The right, therefore, to pursue the ordinary mode by petition and citation still exists.

Winn, on the same side.

This is a suit in the ordinary mode, against the sureties in a bail bond, the tenor of which is, that the principal shall appear from day to day until discharged by the court. The principal afterwards failed to appear, and was never discharged by the court, consequently his sureties are liable.

2. The state has the right to proceed on forfeited bonds, in the ordinary mode of instituting suits. Every obligation when due, or a forfeiture has accrued, gives a right of action, and may be sued on by the party entitled to prosecute the same. *Code of Practice*, 14.

3. The act of 1835, does not deprive the state of the ordinary remedy, and it is competent for it to seek the enforcement of recognizances, as in ordinary cases of suits or obligations, and waive the extraordinary remedy.

4. The act of 1835, is wholly inoperative in a case like this. It requires the parties to be called on the second day of the term, and if they fail, judgment *nisi* is to be entered, and a forfeiture and final judgment rendered at the following term, unless good cause is shown. Here the parties appeared when called, according to this statute, but the principal *disappeared* without leave of the court, and has not been produced by his sureties. Judgment *nisi* could not be entered on the second day of the term, and no final judgment could ever be rendered against the sureties. The state would, therefore, be entirely remediless, if this mode of suing is denied to it.

5. As respects the merits of this case, the principal was arraigned, and appeared; was tried and convicted on two indictments. After verdict, he absconded and has not since appeared. There was no new bond given, and the tenor of the first one is, that he shall continue in attendance until discharged. He was never discharged, but eloped.

6. He was at the time, and is now, in the custody of his sureties. They were never exonerated or discharged from their suretyship, because the principal was never surrendered. He must be surrendered in discharge of his bail on the indictment, and an *exoneratur* entered. *Comyn's Digest, verbo Bail; letter O*, 2, and *letter Q*, 2.

7. The principal is in the custody of the bail, until an actual surrender. Nothing but this, and a discharge entered on record, will exonerate the sureties. 1 *Chitty's Criminal Law*, 105.

Roberts, for the defendants, contended, that the act of 1835, was imperative as to the manner of proceeding against bail. It was the duty of the district attorney to proceed in the mode prescribed in the act, and in no other. He is excluded from the ordinary remedy by suit.

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2. On the appearance of the principal in court, to stand his trial, the bail are necessarily discharged. The prisoner must give a new bond before he can be admitted to bail, for he is in the custody of the law officers.

3. In every case where a verdict of guilty is found by the jury, the prisoner cannot go out of the custody of the sheriff, without giving new bail; and after conviction, and before judgment, a prisoner cannot be bailed without the consent of the prosecutor. 4 *Burrow's Reports*, 2539, 43, 45, 73. 1 *Chitty's Criminal Law*, 95, 105.

4. All the proceedings in criminal cases in this state, are required to be proceeded in, according to the principles and mode pointed out by the common law of England, with the modifications made by the legislature. 1 *Moreau's Digest*, 369, *section* 33.

5. The appearance of the principal, his arraignment, trial, etc., was sufficient to annul and discharge his recognizance. *State* vs. *Dunlap*, 10 *Louisiana Reports*, 99.

6. According to the English law, if the *exoneratur* is, by neglect, omitted to be entered, yet, if the prisoner appear, the bail is discharged, and an entry to this effect will be made. *Comyn's Digest*, *verbo Bail.*

Dunbar, for the defendants, contended, that the exception to the action should be sustained, because the act of the legislature of the 2d April, 1835, prescribed the only mode in which a recovery could have been had on a bail bond. See *Session Acts of* 1835, *page* 219, 220. That the act of the 9th March, 1827, gave to the attorney general and district attorney, discretionary powers to proceed in any manner they might think best to prosecute claims on behalf of the state. 2 *Moreau's Digest*, 416. But that this discretion had been taken away by the express repeal of the latter act, by the act of 1835, before mentioned; that the act of 1818, (See 1 *Moreau's Digest*, 386,) had prescribed a mode of proceeding by ten days notice, but that the act of 1835, had also expressly repealed that mode.

2. That it was true that the rules of the common law of

England, as to *criminal prosecutions*, the forms of indictments, and the definition of crimes had been adopted in Louisiana, see 1 *Moreau's Digest*, 369, *sec.* 33; but that the mode of proceeding in England on a forfeited bail bond, by *estreating* it, and by *scire facias*, had not been in any manner adopted in Louisiana, but a particular mode of recovery pointed out by the statutes above referred to, which must be followed; that this was rendered, if possible, more evident, from the act of 1837, by which the act of 1835, is repealed; except the 7th and 8th sections, one of which is the section repealing the before mentioned act of 1827; that if there was any defect in the law of 1835 the bail had a right to protect themselves under it, and that the district attorney had no right to change the mode of proceeding at his pleasure, for the recovery of the bonds; for, if even indulgence is granted by the court, or the nature of the action changed, the bail is relieved. 6 *Martin, N. S.*, 529. The legislature could not have changed it so as to affect the bail. 1 *Peters' Condensed Reports*, 176.

3. There is no law which authorizes a civil suit in the name of the governor, on a bail bond, and it was in vain to say, that because the law had prescribed a particular mode of procedure against bail, that it did not exclude other modes of proceeding. This argument might have been good, if several modes had been prescribed, or if the legislature had not clearly manifested its intention of taking away all discretion or choice, as to the mode of proceeding, by the repeal of the act of 1827, above referred to.

4. The bail were relieved by the appearance of the principal, when called upon to produce him under the provisions of the act of 1835. Security in an ordinary bail bond is only answerable for the appearance of the defendant. 1 *Chitty's Criminal Law*, 92, 105, 106. *Hawk. book* 2, *chap.* 15, *sec.* 84. *Bac. Ab. verbo Bail.* 4 *Blackstone*, 297. 3 *Ibid.*, 290 and 291. When the defendant appears, he should be arraigned and tried, and if this cannot be done, the district attorney should pray the court to order him into custody. 10 *Louisiana Reports*, 101.

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5. In this case, the defendant not only appeared and plead, but was tried on two of the indictments, and found guilty, and was present in court during the trials, and at the bringing in of the verdicts. Now he was not bailable after conviction. 1 *Chitty*, 93. 4 *Burrow's Reports*, 2545, 2539. 1 *Chitty*, 664. The defendant should have been committed during the interval between conviction and judgment, unless a recognizance had been given to appear and receive judgment, which is entirely different from the bail in the commencement of the prosecution. The defendant, Jackson, was then in the custody of the law, and not in the custody of the bail. If bail is not given, and the defendant does not appear, process of the court is issued to bring him in and force an appearance. Now the bail prevents the necessity of this process, by binding themselves to cause that to be done, to effect which, the process would be issued, to wit: the appearance in court of the defendant. As to this process, see 1*st Chitty's Criminal Law*, 337 *to* 370, *and* 4*th Blackstone, from* 297 *to* 323.

6. The act of 1835 not only points out the manner in which bail is *forfeited*, but the manner in which bail is to be *relieved*. This law makes the second day of the term the *appearance day*, and the sureties are to be called on that day and no other, to produce, *instanter*, the person of the defendant, and on *failure* a judgment *nisi* is to be entered against them, and it is a *consequence* that if the defendant appears, or is produced, there is no forfeiture, and there can be no judgment. Whenever the bail produces the defendant, when called upon to do so regularly, an *exoneratur* should be entered on record, but if the clerk, or officer of the court, fails to make the entry, the bail is nevertheless discharged; more particularly, if the counsel of the opposite party have notice, as the district attorney had in this case. See *Comyn's Digest, verbo Bail, Q.* 2. And if the English law of bail is to be invoked against the defendants in all its rigor, they must also be entitled to its clemency; for which see 1*st Chity*, 92, 93, 106.

7. The legislature of Louisiana, and the constitution, have

directed in what cases bail shall be allowed, but have not defined the liabilities of bail; and it is, no doubt, proper to refer to the English law for information, inasmuch as their system of criminal law is the foundation of ours, but that it would be manifestly unjust to be guided entirely by the rigor of the English law, disregarding its clemency, even although this clemency should be provided by acts of parliament.

8. Under the act of 1817, (*see Moreau's Digest, page* 27,) which has not been repealed, the attorney general and district attorney were directed to prosecute all claims of the state, and to appear on her behalf in all suits in which she might be a party, but this was nothing but the imposition of a duty in consideration of their salaries, and did not direct the manner in which suits should be brought on claims, any more than it directed that prosecutions should be by indictments; and, therefore, other acts were passed defining the modes of prosecution, and the recovery of claims, on behalf of the state, and that these must be pursued.

Bullard, J., dissenting, the judges delivered their opinions *seriatim.*

Carleton, J.—This action is brought against the sureties of C. W. Jackson, to recover the sum of eight thousand dollars, the penalty of two bonds, in which they obligated themselves *in solido* with him to the state, conditioned for his appearance at court, in the April term of 1836, there to answer certain charges, and not to depart without leave of the court.

The petitioner alleges, as a breach of the condition of the bonds, that Jackson failed to appear as he was bound, and having departed without leave of the court, the defendants, his sureties, failed to produce him when thereto required.

The defendants, after excepting to the form in which the action is brought, aver, that they were discharged from their obligation, by the appearance of Jackson on the second day of the term, and by his arraignment and trial, at which he was present.

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The cause was submitted to the court, who rendered judgment for the plaintiff, and the defendant appealed.

It seems from the statement of facts coming up with the record, that Jackson and his sureties appeared at court on the second day of the term, and were called on their recognizances at the instance of the district attorney; that some days thereafter, he appeared again, and plead to two of the indictments, on which he was tried and convicted. It moreover appears, that proclamation was made for him after his conviction, but that he could not be found.

1. For the defendants, two grounds of defence are *mainly* relied on: first, that the plaintiff was restricted to the summary mode of proceeding against the sureties provided by the law of 1835, page 219, section 1, then in force, and that he had not his election to proceed *via ordinaria*. I think differently. The law of 1817, 1 Moreau's Digest, page 27, section 3, *provides*, that "the attorney general, and the several prosecuting attorneys of this state, shall be bound to prosecute, or sue in all cases, either criminal or civil, where the state shall be a party." This law is not expressly repealed by the act of 1835, nor does that act contain any thing contrary to, or irreconcilable therewith. *Louisiana Code, article* 23. Nor could there be any good reason assigned, even if the law were silent on the subject, why the state should not, as well as every other suitor, have their choice of remedies where more than one existed. Nor have the defendants any just ground of complaint against this mode of trial, it being more advantageous to them, especially as they might have availed themselves of the trial by jury.

The majority of the court were of opinion that, the district attorney had the choice of remedies, and could proceed against sureties in bail bonds by ordinary suit, and waive the summary mode of proceeding under the statute of April 2d, 1835. The state may select any legal means of instituting suit, which individuals may resort to.

2. The counsel for defendants contend, secondly, that by the appearance of Jackson, on the second day of the term, and also at his arraignment and trial, his sureties were discharged from their recognizances by operation of law.

This point has been ably and elaborately discussed by counsel on both sides, and many authorities, mostly from the common law, cited and commented upon at length. Defendants' counsel has particularly drawn our attention to Chitty's Criminal Law, pages 93, 105 and 665. But it appears to

me, that this authority does not bear him out in the position he has taken: for it is not possible, that any construction put upon the language of the bond, can at all vary its plain and obvious meaning. The sureties there stipulate, that their principal shall appear at court, and "not depart thence *without leave* of the court, then and in that case the above obligation to be null and void, otherwise to remain in full force and virtue." The accused did accordingly appear, but *departed* thereafter without leave of the court, whereby the condition of the bond was broken, and the forfeiture incurred. It may, indeed, be hard for the defendants to be compelled to pay so large a sum of money, from an erroneous conception of their obligation. But the remedy, if any, is with the legislature, and not this court. I fully concur in the able opinion delivered by the district judge, and think his judgment ought to be affirmed.

Where the sureties on bail produced the principal on the day, and when called, according to the tenor of their bond, who was arraigned, tried, and found guilty by the jury on two indictments, and afterwards *disappeared*: *Held*, that the sureties were *not discharged*, because the bond stipulated that "the principal shall appear at court, *and not depart thence without leave of the court*, which was not obtained in this case.

Bullard, J., dissenting.—At first, my opinion was that the judgment in this case ought to be affirmed, but upon more mature reflection and examination of the authorities, I have not been able to bring my mind to that conclusion. I will briefly state the grounds of my opinion.

I do not contest the general principle, that a party entitled to a summary as well as an ordinary remedy, may resort to either at his option. But in no case, in my opinion, ought this option to be permitted, when the law has pointed out a specific remedy, where a resort to a different mode of proceeding would deprive the defendant of any legal advantage, and render his condition more onerous. The present is an action of debt upon a penal bond. If the state has a right to maintain an ordinary action upon it, without observing the forms required by the act of 1835, it may be done at any time, at least within ten years, without any notice to the bail; even against the heirs of the bail, after the transaction has been forgotten, and no trace is to be found of it except the bond, and the minutes of the court, showing that the body of the accused was not produced, on proclamation being made.

Bullard, J., dissenting. When there is a summary as well as an ordinary remedy provided by law, the party may resort to either at his option; but in no case ought this option to be permitted, when the law has pointed out a specific remedy; and a resort to another would deprive the defendant of any advantage, and render his condition more onerous.

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The statute requires previous notice to be given, and the bail may, at any time before the judgment *nisi* is made final, produce the body of the accused, and exonerate himself. But if this mode of proceeding may be pursued, and the surety changes his domicil, the suit may be instituted in a different court, a court which never had cognizance of the principal matter. Suit might even be brought in another state, if he removes, and he would necessarily lose the advantage of surrendering the principal. Such a court would have no power to enter an *exoneratur*. Again, I take it for granted that no action of debt can be maintained, unless the plaintiff shows that he has absolutely a right to recover; that his right is not suspended by any condition, and that the plaintiff had done every thing required by the law of the contract, to entitle him to recover.

The act of 1835, makes it the duty of the district attorney, on the second day of each regular term of the court, to call all persons who may have entered into any bond, recognizance, or obligation, for their appearance or their attendance, and also to call on the sureties or securities, to produce the person of such defendant, *instanter*, etc., and upon failure to comply therewith, on motion of the district attorney, the court shall enter up judgment *nisi*. It is then made the duty of the clerk to issue copies of this judgment, to be served on the parties, and on the second day of the next succeeding term, or any day after, the judgment may be made final, on proof being made of the notice of the judgment *nisi*. *Acts of* 1835, 219. In the present case, the traverser did appear when called on the second day of the term. He was produced by his bail. The district attorney knew it, took notice that he was in court, and he was arraigned and tried at least on two of the indictments. At that time there was no default on the part of the bail. If his mere appearance did not discharge the bail, and they were still bound for his appearance from day to day, and even at the next term, as has been contended by the state, and as may be admitted for the purpose of this argument, then there was an existing recognizance for his appearance at the next term of the

court, and the bail could be put in default, the recognizance declared forfeited, and even a judgment *nisi* entered, only on the second day of that term. According to the argument, therefore, of the district attorney himself, it was only on the second day of that term that he could call the sureties and put them in default. Nothing, in my opinion, authorized the district attorney to enter a judgment *nisi* on any other day of the term, and the notice of such judgment cannot be dispensed with, according to the law existing at that time. But it is said the statute was entirely nugatory and ineffectual. That is no consideration for this court, which has no power to patch up defective legislation.

But is it so clear that by producing the body of the traverser, and giving notice of the fact to the district attorney, the bail was not, in fact, exonerated, without any formal *exoneratur* being entered? According to the English authorities, although the *exoneratur* be, by neglect of the officer, not actually entered, yet, if the plaintiff be apprized of the surrender, *scire facias* against the bail shall be set aside, though the plaintiff's attorney knew not of the surrender. *Comyn's Digest, verbo Bail, Q.* 2. In this case, the district attorney was apprised of the fact that the defendant had been produced in court, in compliance with the recognizance, and he proceeded to conviction without ordering the defendant into custody, even after verdict against him. I have no doubt the bail thought himself discharged, but even if he was not, he could not, in my opinion, be put in default until the second day of the next term, for it is clear the court could not pronounce the judgment *nisi* on any other day of the term. In my opinion, therefore, the state is not entitled to judgment, because the bond was not forfeited according to the law existing at that time, and forms were not pursued, which were required by law to entitle the state even to a conditional judgment against the bail. I have not the least doubt but that the Court of Exchequer in England, under the strong equitable circumstances of this case would relieve the bail. Without assuming any such equitable powers, I think that at least we ought to hold the

It is not so clear that when the body of the *accused* is produced by the bail, and notice given to the district attorney, the bail is not exonerated without any formal *exoneratur* being entered. According to the English authorities, such would be the effect of a surrender by the bail.

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state to a strict compliance with its own laws, more especially in cases where the primary object of bail is to secure the personal appearance of persons accused of criminal offences.

But it is contended that the attorney general is empowered to prosecute in all cases in which the state is a party; and, consequently, has a right to pursue any form which the law authorizes in ordinary cases. I deny that a general authority to sue authorizes him to pursue any other remedy than that which the law makes it his duty to pursue in particular cases. This general power is conferred by the act of 1817, section 3, which declares merely that the attorney general, and the several prosecuting attorneys, shall be bound to prosecute or sue in all cases, either civil or criminal, where the state shall be a party. 1 *Moreau's Digest*, 27.

The act of 1818, permitted judgment to be given, on motion, against bail, after ten days notice of such intended motion.

The act of 1827, has also been relied on as confirming this power. That statute makes it the duty of the attorney general, and district attorneys, within their respective districts, to pursue, on behalf of the state, such legal measures as they may deem expedient for the recovery of all claims of the state, the *recovery of which is not otherwise provided for;* and they are allowed a commission of five per cent. upon the amount recovered. 2 *Moreau*, 416.

This act gives a discretionary power except in cases in which the recovery is otherwise provided for. The recovery on bail bonds in criminal cases, is expressly provided for by other laws. It is made the duty of those officers to prosecute upon them as incidental to their duties in criminal prosecutions, for which they have a fixed salary, and they are not entitled to a commission on the amounts of penal bonds taken in such cases. But this last statute has been expressly repealed by the act of 1835. See *Acts of* 1835, 220, *section* 8. The discretion, therefore, vested in the attorney general, by the act of 1827, has been expressly revoked, and whence does he derive his power to pursue a remedy not only novel and unprecedented, so far as I am acquainted with the

practice, but variant from that which it is made his duty to pursue under the statute in question.

My opinion is, therefore, that the judgment should be reversed, and ours be for the defendants.

Martin, J.—The defendants, who are the sureties on bail of one Jackson, charged with criminal offences, are sued in an ordinary action, in the name of the governor, in behalf of the state, on their bail bonds.

The defendants pleaded, that the act of the 2d April, 1835, page 219, prescribed the only mode in which the bail, in criminal prosecutions, can be sued; and, this mode not having been pursued, they ought to be discharged. Secondly, that on the second day of the term at which their principal was bound to appear, he and they were called, and they immediately produced him in open court, and that they were thereby discharged. Thirdly, that afterwards, and during the same term, the principal was tried and found guilty, and remained in court for more than twelve hours thereafter.

Judgment was given against the sureties on the bail bonds, and they appealed.

It appears, that afterwards, and during the same term, the principal failing to appear and abide the judgment of the court, he and the defendants were solemnly called, and without avail. A rule was taken to show cause why the recognizances should not be forfeited.

The counsel of the appellants have contended, that they were improperly sued in an ordinary action; the law authorizing no proceedings against them, except the summary one prescribed in the act of the 2d April, 1835.

2. That they were discharged by the appearance of their principal, on his being called for the first time, at the term to which he was bound to appear.

3. That the act of 1817, having authorized the attorney general, and district attorneys, to carry on suits in which the state is concerned, without directing any mode of doing so, these officers are bound to carry on those suits in a manner which was afterwards prescribed.

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4. That the act of 1835, having been repealed before the judgment appealed from was pronounced, it was improperly rendered.

The state, in my opinion, is in our court entitled to select any legal means of instituting suits which individuals may resort to. The general remedy in every case is by petition. Summary proceedings are authorized, both in favor of the state and individuals. Either of them may be resorted to at pleasure. If, however, the legislature has seen fit to confine the officers of the state to the summary remedy, they cannot resort to the ordinary mode of proceeding, by petition. This leads to the inquiry whether it has been done. The counsel for the appellants contends that it has; and endeavors to prove it by the first section of the act of 1835, which requires the officers of the state, on the second day of each term, to call all persons who may have entered into a bond, or recognizances, to appear, or produce their principals, and on failure, to have a judgment *nisi* entered, etc. The call on such persons, only, is necessarily confined to the second day of the term. Persons who are bound not to depart from the court, without leave, may be called on any other day of the term, as, for example, when a prisoner is to be arraigned, tried, or sentence is to be passed on him, it would be absurd to say that the call, in such a case, is to be delayed until the second day of the following term. They are not embraced in the section referred to, and it is not clear that the proceedings on failure to appear, or produce the principal, in such cases is to be regulated in the manner prescribed in that section. When the forfeiture of the bond has become a matter of record, it may be put in suit, in the ordinary way, and perhaps in no other. It is unnecessary to inquire whether a forfeiture recorded on the second day of the term cannot be prosecuted also in the same manner. The object of the legislature was, to make it the duty of the officers of the state to call all persons bound to appear, in court, on the second day of the term; and it does not necessarily follow, that because they provided a summary remedy, more onerous to the parties than an ordinary suit, inasmuch as it deprives them of a trial by jury, and, by being extremely expeditious,

When the forfeiture of a bail bond has become matter of record, it may be put in suit in the ordinary way, and perhaps, in no other.

shortens the period during which the bail may relieve themselves by a surrender, the state meant to abrogate the remedy by ordinary suit. The defendants in this case were bound not only for the appearance of their principal, on the second day of the term, but for his forthcoming in court. On this part of the case, I think the District Court did not err in sustaining the suit.

2. The second ground taken by the counsel for the appellant is untenable.

3. I have already said that the provision for summary proceedings, does not abolish that by petition, in the ordinary manner.

4. The act of 1835 provided only for proceedings in a summary way. It said nothing of proceedings by petition. The repeal of it could not prevent a judgment on such a proceeding.

I feel no hesitation in saying that the defendants appear to be the victims of their misconception of the act of 1835, and to have thought themselves discharged by the appearance of their principal at the second day of the term. The words of the act appear to me calculated to induce such an error. But this circumstance cannot influence the judgment of the court.

I conclude that the judgment of the District Court is correct. The junior judge is also of that opinion, and we constitute a majority of the court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE PARISH OF CARROLL, THE JUDGE OF THE SECOND PRESIDING.

Prescription is interrupted when the possessor is cited on account of the property or the possession; and the same rule applies to the prescription *liberandi causâ*. It is interrupted although the tribunal be without jurisdiction.

The citation of a debtor, by service of the citation together with a copy of the petition, although it may appear that the copy was not duly certified by the clerk, is a sufficient judicial demand to interrupt prescription.

Interest arising *ex morâ* is in the nature of damages for the non-performance of a contract to pay money, and is presumed to have been in the contemplation of the parties at the time of contracting; it must, therefore, be governed by the law in force at that time, which cannot be varied by any subsequent change in the law.

So, where a law was passed allowing interest at eight per cent. on promissory notes: *Held*, that it did not apply to notes *executed* before its passage, although not paid, and some of them not due, at the time of its passage.

This is an action to recover five thousand nine hundred and forty-four dollars and twenty-nine cents, due by the defendant, on four promissory notes of one thousand six hundred and thirteen dollars and twenty-six cents each, executed *in the state of Mississippi*, the 12th September, 1818, together with eight per cent. per annum, interest, from June, 1823, until paid. The notes were annexed to the petition.

The plaintiff alleges, that when the defendant executed said notes, he mortgaged some land and four slaves, to secure payment, and has since removed with said slaves to this state. He prays judgment, and that the mortgaged slaves be seized and sold to satisfy his demand.

The defendant admitted his signature to the notes sued on, but averred they were prescribed by lapse of time, which he pleaded as a peremptory exception.

There was first a judgment on these pleadings and issues, for the defendant, and a new trial was granted.

The plaintiff amended his petition, by alleging, that on the — day of July, 1829, and at divers other times, before and since, the defendant acknowledged the debt on which this suit is instituted, and thereby interrupted prescription, or prevented its being acquired; and by his said acknowledgments, both verbally and in writing, has renounced prescription.

To this amended petition, the defendant pleaded the general issue, and prays that the plaintiff be held to strict proof thereof.

The testimony showed, that an agent of plaintiff called on defendant in 1830, and presented the notes sued on, to which he replied, he must *settle personally with the plaintiff, in New-Orleans;* that after judgment had been given for defendant, and before a new trial was granted, he told plaintiff's attorney, that he was then clear of the debt, but he (plaintiff) should not be the sufferer by it, as he would do his duty as a gentleman.

It appeared also, in evidence, that several negroes were mortgaged to secure the payment of these notes, and as late as 1830, an agent of plaintiff again demanded payment, and presented written proposals in relation to the mortgaged property. Defendant did not deny he owed the debt, but *said he must settle himself personally with plaintiff.*

Suit was instituted, and citation and petition served on the defendant in 1832. The defendant excepted to this service, that the copy of the petition was not certified by the clerk. In 1834, another service was made of a properly certified copy, but the defendant pleaded that the prescription of five years had run before this last service was made. The district judge was of opinion, there was a sufficient acknowledgment to take the debt due by said notes, out of prescription, and gave judgment for the plaintiff. The defendant appealed.

M'Guire, for the plaintiff, contended, that there was no error in the judgment; that the objection to the want of proper service of the petition can have no effect. The cita-

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tion was well served, and this is sufficient to interrupt prescription. The debt was acknowledged by the defendant in a letter to the plaintiff, dated in July, 1829, in which he tacitly admits the notes were not paid, but that he must see and *settle with him personally.* Prescription was interrupted by this acknowledgment. *Louisiana Code, article* 3486, 3517. 3 *Louisiana Reports,* 263. 2 *Starkie,* 892, and *note;* 893 and *note.*

2. If the acknowledgment be general, still it is binding, unless the defendant show some other existing debt. 2 *Starkie,* 895, and 896, and *note A.* 13 *Johnson,* 510.

3. An acknowledgment of the debt, or some debt, is sufficient, as if he says he will pay if the creditor proves his demand; or if he promises to account, although he should add, that he owes nothing. 2 *Peters' Condensed Reports,* 461, and *note.*

4. The notes were made in Mississippi, and must be governed by the laws of that state. The law in force there when the notes became due, gave eight per cent. interest per annum; and although this law has since been passed, the notes should draw interest, because it was the fault of the party that they were not paid at maturity, so as to avoid interest.

Downs, for the defendant, showed, that the judgment was for too much, and on that account alone, must be reversed. No interest should have been allowed. Both parties resided in Louisiana after the summer of 1822, when the notes became due. 8 *Martin, N. S.,* 27. 2 *Kent,* 462. See *Revised Code of Mississippi,* 461. *Storey's Conflict of Laws,* 241, 2 & 6.

2. The plea of prescription is good, and ought to prevail. According to the mode of computing prescription, under the *old and new codes,* a recovery on the notes, which fell due in 1820, 1, 2, and 3, was barred at the time the letter of July, 1829, was written. 11 *Louisiana Reports,* 144, 256 and 560.

3. But five years had elapsed from the date of the supposed acknowledgment, in July, 1829, before there was a valid

service of the petition and citation, which was not made until November, 1834. In the first service, in October, 1832, the copy of the petition was not certified by the clerk, and was without the seal of the court; this was not sufficient to interrupt prescription.

4. There was no acknowledgment in this case to take it out of the prescription, which had run. There must be a specific and subsisting debt acknowledged, to interrupt prescription. 10 *Louisiana Reports*, 204, 568.

Bullard, J., delivered the opinion of the court.

The plaintiff sues upon sundry promissory notes, secured by mortgage on a number of slaves. The defence mainly relied on was prescription. There was judgment for the plaintiff, and the defendant appealed.

The notes bear date in 1818; were made in the state of Mississippi, and payable there, on the 13th June of the four following years, 1820, 1821, 1822, and 1823. Much more than five years had, therefore, elapsed from their maturity, before suit was brought. But the plaintiff contends that the repeated recognitions of the debt by the defendant, and his promises to pay, particularly by his letters in the summer of 1829, less than five years before the inception of this suit, precludes the defendant from availing himself of the plea. Taking the whole correspondence together, between the parties, we do not doubt that the defendant acknowledged the debt, or right of the plaintiff, and substantially promised to pay. It is true, in his letters he speaks of settling with the plaintiff, but we know of no other way of settling a note than paying it. But it is contended by the defendant, that the date of his last letter was more than five years before service of citation in this case, in 1834; that a previous imperfect service of citation, in 1832, did not interrupt the prescription. It appears from the record, that the petition was filed in 1832, and the sheriff returned, that he had served on the defendant in person, the citation, together with a copy of the petition. Some days after, he appears to have added to his return a memorandum that the copy of petition

Prescription is interrupted when the possessor is cited on account of the property or the possession; and the same rule applies to the prescription *liberandi causâ*. It is interrupted although the tribunal be without jurisdiction.

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was not certified by the clerk under seal. It does not appear that the amendment was permitted by the court. No proceedings took place until two years afterwards, when a new service was made. It appears to us the court did not err in overruling the exception. The code declares, that prescription is interrupted when the possessor has been cited to appear before a court of justice on account of the property or possession; *article* 3434. The same rule applies to the prescription *liberandi causâ*. It is interrupted, although the tribunal be without jurisdiction. The subsequent article speaks of citation to the debtor. We are of opinion that the service of the citation, together with a copy of the petition, although it may not appear that the copy was duly certified by the clerk, is a sufficient judicial demand to interrupt prescription.

The citation of a debtor by service of the citation, together with a copy of the petition, although it may appear that the copy was not duly certified by the clerk, is a sufficient judicial demand to interrupt prescription.

But it is urged by the counsel for the appellant, that the court erred in allowing interest at eight per cent., from the maturity of the notes, according to the statute of Mississippi, which was not in force when the notes were made, nor when the two first fell due.

Interest arising *ex morâ* is in the nature of damages for the non-performance of a contract to pay money, and is presumed to have been in the contemplation of the parties at the time of contracting; it must therefore be governed by the law in force at that time, which cannot be varied by any subsequent change in the law.

We are not informed what was the law of that state on the subject at the date of the notes, but interest arising *ex morâ* is in the nature of damages for the non-performance of a contract to pay money, and is presumed to have been in the contemplation of the parties at the time of contracting. Damages upon protested bills of exchange, against drawers and endorsers, although not expressed on the bills, must be governed by the law in force at the time the bills are drawn, and could not be varied by any subsequent changes in the law. We cannot distinguish between such a case and the one now before the court. At the maturity of the notes, the holder was entitled to his action. That action must be conducted according to the law then in force. But the amount which he might be entitled to recover depends upon the contract, and the law in reference to which it was entered into. It does not form a part of the remedy, and, in our opinion, the rate of interest arising *ex morâ* depends on the law existing at the time of the contract.

So, where a law was passed allowing interest at 8 per cent. on promissory notes: *Held*, that it did not apply to notes *executed* before its passage, although not paid, and some of them not due at the time of its passage.

The original amount of the debt was six thousand four

hundred and fifty-three dollars and five cents, of which there appears to have been paid two thousand three hundred and ten dollars, leaving a balance of four thousand one hundred and forty-three dollars and five cents, which the plaintiff is entitled to recover with interest after judicial demand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and proceeding to render such judgment as ought, in our opinion, to have been given below, it is further ordered and adjudged, that the plaintiff recover of the defendant four thousand one hundred and forty-three dollars and five cents, with interest, at five per cent., from the 13th November, 1832, until paid, with costs, in the District Court; and it is further ordered, that the mortgaged slaves be seized and sold, to satisfy this judgment, and that the plaintiff pay the costs of this appeal.

KIRKMAN ET AL. *vs.* BUTLER.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE PARISH OF CONCORDIA, THE JUDGE OF THE SECOND PRESIDING.

If the term to which the appeal is made returnable, entirely fails, it will be *in time* to file the record within the first three judicial days of the succeeding term.

Where there was no entire failure of the term, to which an appeal was returnable, and the court was opened on three several days, although it transacted no business, yet the record should have been filed within that time, and not having been done, the appeal was dismissed.

This was an action of debt. At the June term of the Concordia court, 1837, judgment was rendered against the defendant, and he appealed. The appeal was made returnable to the 1st Monday of October, 1837, to the Supreme

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Court, at Alexandria. There was no regular business transacted at this term, in consequence of prevailing sickness, and other causes, but the court opened on Friday, the 5th day of the term, and adjourned to the next day. It then adjourned over to Tuesday, when it adjourned for the term, having been opened three several days, making three judicial days.

The record in this case, was not filed, until the 1st Monday in October, 1838.

M'Guire, for the plaintiffs and appellees, moved to dismiss the appeal, on the ground that the record was not filed in time.

Downs, contra.

Martin, J., delivered the opinion of the court.

The dismissal of the appeal in this case, is asked for, on the ground that it was made returnable to the 1st Monday of October, 1837, and the record was not filed until one year thereafter.

If the term to which the appeal is made returnable entirely fails, it will be *in time* to file the record within the first three judicial days of the succeeding term.

The appellant has referred us to the cases of *Rost* vs. *St. Francis's Church*, 5 *Martin, N. S.*, 191, and *Wells's Heirs* vs. *Lamothe*, 10 *Louisiana Reports*, 410. In both these cases the terms to which the appeals were made returnable, entirely failed, (to wit: October term, 1825 and 1835,) but the transcripts of the records, were filed within three judicial days at the following terms.

Where there was no entire failure of the term, to which an appeal was returnable, and the court was opened on three several days, although it transacted no business, yet the record should have been filed within that time; and not having been done, the appeal was dismissed.

The present case is very different. In October, 1837, there was no entire failure of the court; but there were three judicial days, to wit: the 6th, 7th, and 10th of October. It is true, no business was done at this term on account of prevailing sickness, and an internal commotion. The counsel for the appellant, contends, that this circumstance ought to be received as an excuse for the delay. Neither the sickness or the commotion excited much alarm, until several days after the first day of the term. The court did not meet until the fourth, and its sitting was protracted to the eighth day of the term, during which there were three judicial

days. There was, therefore, sufficient time to file the record, which might have been done, even on the days the court did not sit, by filing them with the clerk.

The appeal must, therefore, be dismissed with costs.

VACOCU'S WIDOW AND HEIRS *vs.* PAVEE.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE SEVENTH PRESIDING.

The judge who tries the case may certify, that the record contains all the evidence adduced on the trial of the cause, because this is a mode of making a statement of facts.

The clerk is required by law to certify, that the *record contains all the evidence adduced on the trial.* Without this certificate, the Supreme Court cannot examine the case on its merits.

The appellant may obtain further time to perfect his record, if *at the time or before* the argument of the cause he moves the court to this effect. He was allowed until the next term to procure a complete certificate, and in the mean time, the judgment on the appeal was suspended.

In this case, judgment was rendered against the defendant, at the spring term of the Natchitoches district court, 1838, and he appealed to the succeeding term of the Supreme Court, to be holden at Alexandria.

Brent and *Winn* moved to dismiss the appeal, on the ground, that the certificate of the clerk was insufficient, as it did not state that the record contained all the evidence *adduced on the trial* in the district court. 3 Louisiana Reports, 295, and other cases were cited.

Dunbar, for the defendant, argued, to show that the certi-

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ficate was sufficient, and cited several decisions of this court in support of his position.

2. He moved for further time to have the certificate completed, if it should not be deemed sufficient, and cited Code of Practice, article 898.

Martin, J., delivered the opinion of the court.

The dismissal of the appeal in this case is asked on the ground of the insufficiency of the certificate of the clerk to the record. This document attests, that the transcript contains "all the proceedings had, and all the documents on file, and also all the evidence taken down in writing on the trial of the cause, wherein, &c., &c., on file and of record in my office."

The judge who tries the case may certify that the record contains all the evidence adduced on the triai of the cause, because this is a mode of making a statement of facts.

The appellant's counsel has contended, that the certificate is sufficient, because the presumption is, that every document introduced is filed, and when testimony is taken down in writing, the whole that is offered is so taken; and he relies on 6 Martin, 722; 10 ibid. 433; 1 Martin N. S. 590; 2 Louisiana Reports, 165, in which this presumption was recognized. All these decisions, except the last, took place before the promulgation of the Code of Practice. In the last, we held it to be sufficient that the judge had certified that the record contained all the *evidence adduced* on the trial of the cause, because this was a mode of making a statement of facts.

The clerk is required by law, to certify, that the "*record contains all the evidence adduced on the trial.*" Without this certificate, the Supreme Court cannot examine the case on its merits.

The legislature has seen fit to require, that presumption should not be resorted to, in order to ascertain that all the evidence adduced below comes up with the transcript; for the clerk is directed in the 896th article of the Code of Practice, to certify that the record contains all the *evidence adduced on the trial.* This is very easily done, and it is unpardonable in that officer to send us a certificate which requires to be eked out by presumptions.

The appellant may obtain further time to perfect his record, if *at the time or before* the argument of the cause, he moves the court to this effect. He was allowed until the next term to procure a complete certificate, and in the mean time, the judgment on the appeal was suspended.

The appellant's counsel has sought relief under the 898th article of the Code of Practice, which provides, that "if at the time of argument, or before, the appellant perceives that the record is incomplete, from the clerk having failed to certify the record, as containing *all the evidence produced in the*

cause, the court may grant him a reasonable time to correct such error, during which time judgment on the appeal shall be suspended."

The appeal in this case was returned to this term. The appellant was in no *laches* in not moving for relief, for it does not appear that the error came to his knowledge until the case was called; and the circumstance of his having endeavored to show that the certificate was sufficient under the decisions of this court, on which he has relied, ought not to deprive him of the opportunity to place the case fairly before us.

It is, therefore, ordered, that the trial of this cause be postponed, and that the appellant have time to perfect the record, until the next term of this court.

MILLIKIN *vs.* MINNIS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE OF THE DISTRICT PRESIDING.

In seeking for the intention of the parties to a written contract, the whole of it must be examined, and if possible, effect given to every part.

In a sale of a tract of land, described in the instrument of writing, as having certain boundaries, but making express reference to a plat of survey, "being four quarter sections as surveyed by M. L.," the reference to the plat of survey, must control the vague and indefinite description of the boundaries, in other clauses of the contract.

The titles of the parties, and not the manner of putting in possession, or the acquiescence of one in the possession of the other for a time, will control, when the pretensions set up under this possession, are wholly inconsistent with the written titles.

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Parole evidence, admitted to show the act of putting in possession, in a manner manifestly erroneous and inconsistent with the written evidence of title, will be disregarded.

This is a petitory action, in which the plaintiff sues to recover a piece of land in the possession of the defendant, who insists in running his line in a diagonal direction, so as to take a hundred and eighty-five acres off the rear of the plaintiff's tract, which adjoins him immediately above, on the Mississippi river.

It is shown that in 1825, John Millikin, the plaintiff, had a pre-emption right to a section of land, adjoining his residence, on the Mississippi river, which had been surveyed and laid off into quarter sections by one Maxfield Ludlow, but the government price was not yet paid on it.

Millikin, being in the state of Mississippi, entered into an agreement with the defendant, to sell this land to him for the price of eight thousand dollars, and gave what is called a title bond, binding himself to make title to the land.

The bond reads: "Know all men by these presents, that I, John Millikin, of the state of Louisiana, and parish of Concordia, do acknowledge myself bound unto C. B. Minnis, of the city of Natchez, and state of Mississippi, in the sum of sixteen thousand dollars, which, truly to be paid, I bind myself, my heirs, executors, etc., firmly by these presents, sealed, etc., and dated the 1st day of January, 1825.

"The condition of the above bond is such, that whereas the above bound Millikin, has this day obligated himself to make a complete title to the said C. B. Minnis, to a certain tract of land, being and lying in the state of Louisiana, and parish of Concordia, situated on the river Mississippi, and commencing on said river, and running back through the lane now existing between the said tract and the tract claimed by the representatives of Peter Smith, deceased, and extending on the river about three quarters of a mile; that is to say, to the fence now existing between the said Millikin and the tract of land now in the possession of William Elliot, and running on said fence, and beyond the same, containing six

hundred and forty acres, more or less, *being four quarter sections, as surveyed by Maxfield, Ludlow, etc.*

"In consideration of which the said C. B. Minnis, is to give to the said Millikin eight thousand dollars, in the following payments, etc.

"The said Minnis binds himself to pay to the United States, one dollar and twenty-five cents per acre, for the said land, whenever thereunto required by the United States, etc."

"Now, if the said Millikin shall comply with every and each of the obligations above mentioned, then this bond to be void, etc. "JOHN MILLIKIN, *Seal.*"

The evidence shows, that in accordance with this obligation, Minnis did pay the government of the United States, the price of one dollar and twenty-five cents per acre, and received patents for these four quarter sections of land, according to Ludlow's survey, and was put in possession.

Subsequently, the defendant endeavored to take advantage of the expressions in the title bond, "*and extending on the river about three quarters of a mile; that is to say, to the fence now existing between* the said Millikin, and the tract of land now in the possession of Wm. Elliot, *and running on the said fence and beyond the same, containing six hundred and forty acres, more or less, etc.*"

By taking this fence as the line, and running on it, through to the back lines, it cut off in a diagonal line, one hundred and eighty-five acres of Millikin's land in his rear, and which was out of the four quarter sections, as surveyed by Ludlow, and patented to Minnis, by the government of the United States.

The district judge, from an examination of the evidence, came to the conclusion, that the plaintiff had not shown himself entitled to the land which he claimed, and, consequently, had failed to make out his case. Judgment was given for the defendant, from which the plaintiff appealed.

M'Guire, for the plaintiff.

1. We contend, that the first part of the description, was only to give a general idea of where the land lay, as is

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expressed by the lower line, "running back through the lane now existing, etc." This contract was not made upon examining the premises, but in the state of Mississippi; and every part of it speaks of the land as one entire thing, composed of the four lots or quarter sections, and speaks of nothing but what was contained therein, as in a sale *per aversionem*. And had there been double the quantity in those four lots that was sold, or only half the quantity specified, that alone passed by the sale.

2. The parole evidence taken to show the plaintiff put the defendant in possession according to the boundaries by which he claims, is illegal and should be disregarded. But suppose he did put him in possession; if he did it contrary to the written contract, it can have no effect, because it was done in error, unless in accordance with the contract. 1 *Martin, N. S.*, 456. 3 *Ibid.*, 11. 5 *Ibid.*, 238. 6 *Ibid.*, 697. 12 *Martin*, 114, 425.

3. There is no ambiguity in the written contract; it is only in the illegal testimony admitted, to vary the construction of it.

4. The contract is restrained by a general description, but is confined to the thing the parties intended to contract about; and the reference to Ludlow's plat of survey, shows plainly what it was. *Louisiana Code*, 1954, 1956.

5. If the fence described as one of the boundaries, is different from the boundary contained in the written title, it gives nothing, but must be governed by the latter. If confined to the former, it is error. 6 *Martin, N. S.*, 697.

6. This is not a sale *per aversionem*, for it calls for a specific number of acres, and title only passes for this amount. 4 *Louisiana Reports*, 515.

Downs, on the same side, insisted, that the contract between the parties should be so construed, as to give effect to every part of it; that where a party sells a certain quantity without boundary, the purchaser takes only the quantity designated; and the common intention of the parties at the time, must govern, as to the construction of the contract of

sale. 10 *Martin*, 571. 12 *Ibid.*, 114. 8 *Martin, N. S.*, 365. *Louisiana Code*, 1945, 1954–6. 5 *Martin, N. S.*, 241.

2. This is not a sale *per aversionem*, made according to boundaries fixed; but a sale of four quarter sections of land, as delineated on a particular plat of survey. 7 *Martin*, 234.

3. Where a line commences to run in a certain direction, it will be so continued, unless there be something in the title to show the contrary. When this is the case, it does not so continue to run. 7 *Martin, N. S.*, 122.

4. The buyer must have his quantity; but if his claim exceeds the intention of the parties, he must pay the difference, or take according to his written titles. 6 *Martin, N. S.*, 700. *Louisiana Code*, 2446, 2471, 845–48–51.

Brent and *Selby*, for the defendant.

1. We claim the boundary as described in the written contract, and as the defendant has been put in possession by the plaintiff himself. When the commencement of a boundary line is given, it must continue in the same direction, unless the contrary be shown. 9 *Martin*, 40. 7 *Martin, N. S.*, 122.

2. If the plaintiff urges, that he fixed the boundary by mistake, and is not bound by it, he takes for granted the fact, that he did fix the boundary; and he might as well urge, that he entered into the contract by mistake, because it was in reference to the contract that he fixed the boundary.

3. Parole evidence was admissible, to explain the *latent* ambiguity that exists in this contract. 8 *Martin, N. S.*, 161. What did the plaintiff intend by conveying a tract of land, running from a certain point to a certain fence? Are we not permitted to show what he meant, and what fence was intended, and the direction it runs? In short, to explain the situation of the premises in reference to the boundaries given in the contract?

4. When there is any doubt, the manner in which the contract was executed by one of the parties, with the consent of the other, furnishes us with the clue to the construction to be put upon it. *Louisiana Code*, 1951.

5. Judging matters by the foregoing rule, the plaintiff

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understood it as we did. He adopted the fence mentioned in the contract, *as the line*, and put defendant in possession accordingly. He was actually present, as the parole evidence shows, when this line was marked out, with the fence as the direction.

6. It was to be supposed the plaintiff knew best what land he intended to convey; if, therefore, the doubt has arisen, in consequence of his not having explained himself intelligibly, the law construes the contract more favorably to the adverse party. *Louisiana Code*, 1953.

7. Again, it cannot be supposed, that he only intended to convey the land contained in Ludlow's survey, or he would have stated so explicitly. If this be taken as the guide, the front line *running only to the fence*, will not reach the upper line of Ludlow's survey. The fence line crosses Ludlow's upper line *diagonally*. Is there any thing in the contract which says, that the course of the line is to be changed? Then it cannot be altered. The boundaries must govern as to quantity. 5 *Martin, N. S.*, 239. 7 *Ibid.*, 122.

Bullard, J., delivered the opinion of the court.

This is a petitory action, in which the plaintiff asserts title to the south-west part of lot No. 1, in township No. 17, of range 14, east; and also, of the south-west part of lots No. 17 and 18, in township 17, range 13, east, containing about 150 acres, which, he alleges, the defendant has in possession. He exhibits as evidence of his title, patents from the United States, for the whole of the three lots above designated.

The defendant in his answer alleges, that the land claimed by the plaintiff, is his property; that in 1825, he purchased from the plaintiff, a tract of land, which embraces and includes that now sued for; and that he was duly put in possession thereof, and has ever since continued in possession. He alleges, that he holds the bond of the plaintiff, to make to him a complete title to a tract of land, of which, that in question, forms a part, and he denies that he is in possession of any land not embraced by the description in the bond.

The whole controversy, therefore, turns upon the construction we are to put upon the bond or contract entered into

between the parties, as stated in the answer. This bond recites, that Millikin had obligated himself to make to the defendant "a complete title to a certain tract of land, lying and being in the state of Louisiana and parish of Concordia, situated on the river Mississippi, and commencing on said river, and running back through the lane now existing between said tract and the tract claimed by the representatives of Peter Smith, deceased, and extending on the river about three quarters of a mile; that is to say, to the fence now existing between said Millikin, and the tract of land now in the possession of William Elliot, and running on said fence, and beyond the same, containing six hundred and forty acres, more or less, being the four quarter sections as surveyed by Maxfield Ludlow, etc." Minnis, the defendant, by the same contract, engages to pay to the United States, one dollar and a quarter per acre for the land, whenever required, besides the price agreed on to be paid to Millikin.

The record shows, that the defendant, in pursuance of this contract, paid the congress price, and obtained patents in his own name for the land, as surveyed by Ludlow, being lots Nos. 2, 3, 4, and 5, and these patents do not cover the land in controversy.

It is manifest, therefore, that according to the written evidence, the plaintiff shows a title of the highest dignity to the *locus in quo*.

But, it is contended on the part of the defendant, that according to the description in the bond, the defendant purchased from the lane to the fence, and thence with the fence and beyond it, and that by extending the line in that direction it embraces the land in controversy, and was sold by the plaintiff to the defendant. It is further urged, that the plaintiff put the defendant in possession by that line, and thereby gave a construction to the contract which supports his pretensions, and that the sale was one *per aversionem*, from boundary to boundary, and conveyed all the land included within the limits described. He relies on the case of *Cuny* vs. *Archinard*. 5 *Martin, N. S.*, 238.

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In seeking for the intention of the parties to a written contract; the whole of it must be examined, and if possible, effect given to every part.

In a sale of a tract of land, described in the instrument of writing as having certain boundaries, but making express reference to a plat of survey, "being four quarter sections, as surveyed by M. L.," the reference to the plat of survey must control the vague and indefinite description of the boundaries in other clauses of the contract.

The titles of the parties, and not the manner of putting in possession, or the acquiescence of one in the possession of the other for a time, will control, when the pretensions set up under this possession are wholly inconsistent with the written titles.

Parole evidence, admitted to show the act of putting in possession, in a manner manifestly erroneous

In seeking for the intention of the parties, the whole contract must be examined, and if possible, effect given to every part. The expressions "*being four quarter sections as surveyed by Maxfield Ludlow, etc.*" form an important part of the designation of the land conveyed, and cannot be overlooked. If there had been no other description of the land, it would have been sufficient to convey the four quarter sections, for which patents were afterwards obtained by the defendant. There is no difficulty about the lane which forms the lower line. The dispute appears to have arisen from the vague manner in which the upper boundary has been described, as *running on a fence and beyond it*, without saying either in what direction or to what distance. We are of opinion, that a reference in the contract to the survey of Ludlow, must control the vague and indefinite description of boundaries, in other clauses in the contract.

But the appellee relies upon article 1960, of the Louisiana Code, which declares that "when the intent of the parties is doubtful, the construction put upon it by the manner in which it has been executed by both or by one, with the express or implied assent of the other, furnishes a rule for its interpretation." Under this provision he contends, that Millikin, by putting his vendee in possession, according to the direction of the fence, put a construction upon this contract which concludes him. But it must not be forgotten that this is not the only act performed in execution of the contract of 1825, by the parties. The defendant, in pursuance of that contract, paid the United States for the land embraced by the survey of Ludlow, and took out his patent in conformity therewith; and Millikin obtained patents for the adjacent lots, which embraced the *locus in quo*, and that those acts, and the titles which resulted from them, are wholly inconsistent with the pretensions now asserted. There is nothing in the record to satisfy us that Millikin intended to sell, or the defendant to acquire about one hundred and eighty acres, covered by the patent of Millikin, and not embraced by Ludlow's survey. The parole evidence, admitted to show the act of putting in possession in a manner manifestly erroneous

and inconsistent with the written evidence of title, cannot be regarded by this court as sufficient to destroy the plaintiff's title to the land in controversy.

and inconsistent with the written evidence of title will be disregarded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding to render such judgment as ought, in our opinion, to have been given below; it is further adjudged and decreed, that the plaintiff recover and be quieted in his title to the tract of land claimed in his petition, and that the line beginning on the river, at an elm stump at the letter B, on the plat of survey in the record, and running south, 20° west, the whole extent of the tract, according to Ludlow's survey, be established as the boundary between the parties, and that the defendant pay the costs in both courts.

STATE OF LOUISIANA *vs.* JOHNSON ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE OF THE SECOND PRESIDING.

Judgment *nisi* on bail bonds, need not be signed by the judge, in order that copies be served as notices on the parties. The judge's signature is only required to final judgments.

Service of citation or notice of judgment *nisi*, made on a person *residing* at the domicil of the defendant, found in the street or elsewhere, is irregular. The return should show that copies of the process, *were left at the domicil.*

Where a judgment *nisi* is directed by law to be made final at the succeeding term, and the court fails, it may be done at the following term. The law in this respect is considered as merely directory.

On a motion to make a judgment final, the proceedings are summary, and no particular day need be assigned for trial.

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When an act, creating an offence *is repealed*, even after judgment in the inferior court, the judgment must be reversed if it has not been affirmed before the repeal. It is otherwise when the *remedy* only is changed by a new law.

This is an action to render the sureties in a bail bond liable, given for the appearance of M. Johnson, charged with the murder of Thomas Ash. Johnson was admitted to bail the 5th April, 1836, for his appearance at the June term following, of the Concordia court. The tenor of the bond is thus: "Know all men by these presents that we, M. Johnson, Wm. Nevills, and John Briscoe, are held and firmly bound unto E. D. White, governor of the state of Louisiana, in the sum of three thousand dollars, etc., for the payment whereof, we bind ourselves, our heirs, and assigns, severally, unto E. D. White, governor, etc. Given under our hands, this 5th day of April, 1836."

"The conditions of the above obligation are such, that whereas M. Johnson, has this day appeared before the undersigned, a justice of the peace, and is held to bail on a charge of an assault on Thomas Ash, on the 3d inst. Now, if the said Johnson does appear at the next term of the District Court, to be held at Vidalia, on the 1st Monday of June next, and remain until discharged by said court, and answer to the said charge, then this obligation to be null and void, otherwise to remain in full force and binding, etc.

Signed in presence of } M. JOHNSON,
NICHOLSON BARNES, } W. NEVILLS,
Justice of the Peace. } JOHN BRISCOE.

At this term an indictment for murder was found by the grand jury. Johnson was called and failed to make his appearance; and the sureties being required to produce him also failed, whereupon a judgment *nisi* was entered against the principal in the bond for three thousand dollars; and also, "against the two sureties, for the sum of fifteen hundred dollars each." The court failed at the following December term.

At the June term, 1837, of the Concordia court, the

defendant, John Briscoe, one of the sureties, filed exceptions to the proceeding against him and his co-surety, as follows :

1. That notice of the judgment *nisi* issued prematurely, not being signed by the judge, or certified by the clerk of the court from whence it issued.

2. The service of notice is bad, as the sheriff's return makes no mention of the name of the person on whom it purports to have been served ; and service does not appear to have been made at the defendant's domicil.

3. No service would be legal unless served on him personally, or on a person appointed by the court, in conformity to the act of 1835.

This defendant further pleaded a general denial ; prescription ; and denies there has ever been a forfeiture of the bond.

These exceptions were overruled ; and also a prayer to have a day assigned for trial, that the defendants might prepare for their defence ; the district judge being of opinion that the proceeding was summary, and the party called on to show cause why judgment *nisi* should not be confirmed, was bound to make his showing instanter. The defendants excepted to the opinion of the court.

An answer was filed to the merits, and time to procure testimony being refused, judgment was made final.

The defendant's counsel moved for a new trial on the following grounds :

1. The original copy of the judgment *nisi* was not certified by the clerk, or signed by the judge.

2. There was not as many certified copies of the judgment *nisi*, and the bond served, as there are defendants ; and that no attorney, or *curator ad hoc* was appointed to represent Johnson, who was absent.

3. The bond upon which judgment is rendered, is a joint obligation, and the judgment should have been joint.

4. There was no court at the time the principal was required to appear, consequently there was no forfeiture of his bond.

5. Time to procure testimony was improperly refused.

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The motion for a new trial was overruled, and the defendants appealed.

Stacy, late district attorney, appeared for the state.

Dunlap, for the defendants.

Martin, J., delivered the opinion of the court.

The defendants, John Briscoe and Wm. Nevills, bail of M. Johnson, are appellants from a final judgment on their bond. They pleaded, first, that notice of the judgment *nisi* issued prematurely, not being signed by the judge of the court, or certified by the clerk according to law.

2. That it was not legally served, the sheriff having failed to name the person upon whom it was served, or that he served it at defendant's domicil.

3. No service could be legal, unless served upon him in person, or upon a person appointed by the court, in conformity to the act of 1835.

Judgment *nisi* on bail bonds need not be signed by the judge, in order that copies be served as notices on the parties. The judge's signature is only required to final judgments.

I. The judgment *nisi* did not require the signature of the judge, which is only required in final judgments. The allegation that the copy of the judgment and bond, was not certified by the clerk, is absolutely gratuitous, and unsupported by proof; for the sheriff has attested, that he *delivered* a true certified copy of the judgment, and the bond annexed.

II. The sheriff's return shows, that certified copies of the judgment and bond, was served personally on the defendant, Nevills, and therefore, legally; so that as to him the plea fails. The sheriff's return, also shows, that as to the defendant, Briscoe, certified copies were left with a free person, above 14 years of age, *residing* at his domicil.

Service of citation or notice of judgment *nisi*, made on a person *residing* at the domicil of the defendant, found in the street or elsewhere, is irregular. The return should show that copies of the process *were left at the domicil.*

The Code of Practice is silent as to the manner which notices in cases like the present, are to be served; and the act of 1835, under which these proceedings were had, is also silent in this respect. Service on a person *residing* at the domicil of a party, found in the street, or at any other place than the domicil, is, in our opinion, irregular. The return in the present case, does not show that the copies were left at the domicil of the defendant, Briscoe.

In the case of *Huntstock* vs. *His Creditors*, 10 *Louisiana Reports*, 488, the sheriff returned, that he had left the citation with the *clerk of one of the parties*. We held that this was irregular, because it did not appear that he had done so at the defendant's domicil, or counting-house.

The exception to the service on the defendant, Briscoe, is, therefore, sustained.

Where a judgment *nisi* is directed by law to be made final at the succeeding term, and the court fails, it may be done at the following term. The law in this respect is considered as merely directory.

It becomes necessary in regard to the defendant, Nevills, to examine an assignment of error, to wit: "that the court at the June term, 1837, should not have rendered final judgment, because the judgment *nisi* was entered at the June term, 1836, twelve months before, and that the December *term*, 1836, was the *next term* of said court, as established by law; and that the act of the legislature, approved 2d April, 1835, relative to recoveries on bail bonds, directs that the judgment *nisi* shall be made final on the *second day of the next regular term* of the court, or during the term."

This assignment presents the naked question, whether the state is precluded from making proof of the service, and having the judgment *nisi* made final by the adjournment of the court, at the end of the term which followed that on which the judgment *nisi* was taken?

The reason to decide this question in the affirmative, is, that the defendant has the right of showing why the judgment *nisi* should not be made final, and is not bound to exercise it until the state shall have proved a regular service on him; and having failed to do so during the term, as stated in the act, the state is presumed to have abandoned the prosecution.

The reason to decide in the negative, is, that the words of the act are merely directory as to the time of making the judgment *nisi* final, and there is no prohibition against this being done at a subsequent term.

Perhaps the defendant should have shown, that as the judgment *nisi* was taken in June, 1836, and not made final until the June term, 1837, there was a session of the District Court intervening in December, 1836; for, if the court failed at the latter term, the June term following was regu-

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larly the *next term* after that at which judgment *nisi* had been taken. The failure of a term of the court, is, perhaps, not to be presumed, but on the contrary the presumption that the proceedings of the court are regular, is equally strong.

Upon the whole, we conclude, that the judgment *nisi* was properly made final at the June term, 1837.

A bill of exception was taken to the opinion of the court, refusing to assign the cause for trial on a particular day.

On a motion to make a judgment final, the proceedings are summary, and no particular day need be assigned for trial.

It does not appear to us that the court erred. On a motion to make a judgment final, the proceedings are summary, but the party may obtain a continuance on any legal ground. This does not appear to have been asked in the present case.

When an act creating an offence *is repealed*, even after judgment in the inferior court, the judgment must be reversed if it has not been affirmed before the repeal. It is otherwise when the *remedy* only is changed by a new law.

Lastly, it was urged that the act of 1835, authorizing the proceedings on which the judgment in this case was obtained, was repealed after the judgment *nisi* was taken, but before it was made final, and that the repeal disabled the court from making it so.

It is true, that when an act creating an offence is repealed, even after judgment in the inferior court, the judgment must be reversed, if it has not been affirmed before the repeal. The reason of this is, that a legislative pardon is presumed to have been intended. It is otherwise when the remedy only is changed.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court, be annulled, avoided and reversed, so far as it relates to the defendant, Briscoe ; and that so far as it relates to the defendant, Nevills, that it be affirmed with costs.

GILL ET UX *vs.* HUDSON.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE SEVENTH PRESIDING.

Service of the petition and citation of appeal on a particular person, *as the "administrator" of the defendant*, when there is nothing in the record to show that he really is administrator, or has the capacity to represent the heirs, *is insufficient*, and the appeal will be dismissed.

This case comes up on a motion to dismiss the appeal.

On the 22d day of October, 1829, the plaintiffs instituted their petitory action, against Jesse Hudson, for the recovery of sixteen hundred arpents of land. The suit was continued from term to term until April, 1835, when the court made the following order: "The death of the defendant being suggested, it is ordered that this suit be revived against his heirs and legal representatives."

Service of this order was made on a person purporting to be the administrator of Hudson.

At the following October term, an answer was put in as follows:

"The heirs and legal representatives of Jesse Hudson, deceased, come into court by their counsel, and deny all and singular the allegations in plaintiffs' petition contained, and pray to be hence dismissed, etc."

(Signed) WINN & DUNBAR.

Final judgment was rendered in favor of the "*defendant,*" from which the plaintiffs appealed. "The appeal bond was given to the heirs and legal representatives of the late Jesse Hudson, deceased." The sheriff returned service of the citation and petition of appeal, as made on J. H. Hynson, administrator of the estate of Jesse Hudson, deceased, in person, etc."

Winn and *Dunbar*, moved to dismiss the appeal because there was no legal appeal bond.

2. There is no service of citation and petition of appeal, and none ever legally issued; and that the proper persons have not been made parties according to law.

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Barry, Brewer and *Elgee*, contra.

Carleton J. delivered the opinion of the court.

A motion is made by the appellees to dismiss the appeal in this case, on the following grounds, viz :

1. There is no legal appeal bond.

2. There is no service of citation, and none ever issued, and that the proper persons have not been made parties according to law.

It appears that the defendant died pending the suit in the court below, and on his death being suggested, his "*heirs and legal representatives*," were made parties defendant.

Service of the petition and citation of appeal on a particular person, as the "administrator" of the defendant, when there is nothing in the record to show that he really is administrator, or has the capacity to represent the heirs, is insufficient, and the appeal will be dismissed.

The citation of appeal is addressed to the "representatives of Jesse Hudson," upon which the sheriff made the following return :

"Received Tuesday 25th August, 1838, and duly served J. H. Hynson, administrator of the estate of Jesse Hudson, in person, with a copy of this citation and petition, this 5th day of September, 1838.

(Signed) "SIMON HAIRE, *Dep. Sheriff.*"

This service of citation is plainly insufficient. The name of Hynson is no where to be found in the record, except in the sheriff's return. Whether he be really the administrator of the estate of the deceased, or has the capacity to represent the heirs, does not appear.

As we are of opinion that the appeal must be dismissed on the second objection taken by appellees, it becomes unnecessary to notice the first.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed at the cost of the appellants.

PANNELL'S HEIRS *vs.* OVERTON.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE SEVENTH PRESIDING.

The object of the monition act of 1834, is merely to provoke an inquiry into the legality of the proceedings which preceded or accompanied judicial sales, and the homologation of such sales, has no other effect than to cure all nullities, resulting from any informality in making the sale.

It is irregular to cumulate a petitory action with the proceedings on a monition to homologate a sale, in the shape of a reconventional demand. If the objection is made, the court will reject such a proceeding and demand.

If the opponents to a monition, set up title in the nature of a petitory action, and the other party chooses to join issue on the merits, the court will proceed to try the case on the titles, as in a petitory action.

The wife had the capacity, even before the act of 27th March, 1835, to make a valid renunciation of her dotal and paraphernal rights on property, ceded by her husband to his creditors, when she appears with the creditors, and compounds with them for a part of her debt.

The heirs of Frances Pannell, deceased by their tutrix, bring suit and oppose the homologation of a sale of a tract of land, containing five hundred arpents on bayou Wacksha, in the parish of St. Landry, and which she alleges was confirmed to Mrs. Frances Pannell, on the 29th day of April, 1816.

This land with other property, was ceded by David Pannell, in 1823, to his creditors. In making his cession the petitioner states, "that he has received from the estate of Wm. Wickoff, an account of his wife's portion, sixteen thousand four hundred and eighty dollars, the greater part of which Mrs. Pannell is willing to relinquish on a competency being secured to her."

In the schedule, this land is surrendered with the following statement :

"A claim to a tract of land on the bayou *Waxé*, in the parish of St. Landry, of five hundred acres, granted by the Spanish government to Mrs. F. Pannell, subject to overflow,

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and the title I am informed has never beeen confirmed; of but little value, say five hundred dollars."

There was then various tracts of land, and other property surrendered, on most of which the creditors had the vendor's privilege and mortgage.

W. H. Overton, and J. H. Johnston, were the syndics appointed by the creditors, to sell the property surrendered.

During the deliberation of the creditors, Mrs. Pannell came forward and made the following relinquishment: "Before me, Thomas C. Scott, parish judge in and for the parish of Rapides, etc., personally appeared Frances Pannell, and her husband, David Pannell, the *former* of whom does, by these presents, declare and renounce, that she never will attempt to exercise any of her dotal or paraphernal rights on the property now surrendered to his creditors, by the said David Pannell, further than the sum of four thousand five hundred dollars, which she has already claimed, and which was allowed her by the creditors at their meeting on the 18th day of October, 1823, and for the payment of which she is now exercising the rights of a tacit mortgage, or lien, on all the property, both real and personal, by her said husband, to his creditors surrendered, which, by law, she is entitled to; and the said Frances does further declare, that she never will interrupt the said property, when sold by the said syndic, further than the said sum of four thousand five hundred dollars, whether the same be purchased by one of the creditors of the said husband, or an indifferent person; hereby renouncing to all intents and purposes, her dotal or paraphernal liens or mortgages on the same. To this act her husband, David Pannell, hereby gives his express consent, and signs with his said wife.

"In testimony whereof, etc., this 20th day of November, 1823.

"FRANCES PANNELL.
"D. PANNELL.

"Done before me, "T. C. SCOTT, *Parish Judge.*
"L. WEEDON, } Witnesses."
"G. OAKLEY, }

The sum stipulated in the foregoing act, was allowed, and paid to Mrs. Pannell, by the creditors. At the sale of the ceded property, the tract of land in question, was adjudicated to W. H. Overton, for the sum of sixty-nine dollars. The sale was made by the parish judge, as auctioneer.

On the 19th March, 1835, Overton took out his monition to have said sale homologated and confirmed.

The heirs of Mrs. F. Pannell, then filed their opposition, and set up title to the property in question, that the title to the land had been confirmed to their ancestor, and was her separate property, and could not be legally sold, as the property of D. Pannell, by his creditors; that the whole of the proceedings under which said sale was made, were irregular, illegal and void, and consequently the sale itself. They pray that the homologation of the sale be refused, and that they be quieted in their title to said tract of land, etc.

Overton joined issue, and set up title to the land as derived from Pannell, under the cession of his property, and syndic's sale.

The district judge sustained the opposition to the homologation of the sale, on the ground that it was made contrary to law, and annulled the sale. Judgment was rendered decreeing the land in controversy, to the plaintiffs, and quieting them in their title thereto. From all of which the defendant appealed.

Hyams, for the plaintiffs, contended, that the sale sought to be confirmed, was illegal for want of many of the formalities required by law; but especially as General Overton was one of the syndics, he could not become the purchaser of any of the property surrendered by the insolvent to his creditors. Under a forced alienation, the purchaser will acquire no title, unless the formalities of law are complied with. 7 *Martin, N. S.*, 181. 3 *Louisiana Reports*, 418. 9 *Ibid.*, 531. *Louisiana Code, article* 1784. 11 *Martin*, 297. 4 *Martin, N. S.*, 267. 8 *Ibid.*, 165. 9 *Louisiana Reports*, 351. 18 *Duranton, Nos.* 206, 207.

2. But Mrs. Pannell made no relinquishment of this tract

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of land; first, she has not done it expressly; second, she has not done so by inference or implication, for no one renounces liens or claims on their own property. This property was placed on the bilan by Pannell, as belonging to his wife, besides the sum of sixteen thousand four hundred and eighty dollars, which he acknowledges due to her for her dotal and paraphernal claims. A renunciation of liens and mortgages on another's property, cannot be tortured into a conveyance of one's own tract of land.

3. None of the forms of law were pursued to make the act, even a good relinquishment, as to dotal and paraphernal rights. The notary should have set forth at length the nature of her rights, whether dotal, paraphernal, or otherwise, on her husband's property, according to law 58, title 18, of the 3d Partidas. 4 *Martin, N. S.*, 230.

4. Mrs. Pannell, could not legally divest herself of the ownership of this tract of land, by giving it in payment of her husband's debts, or surrendering it to his creditors; and she had a right to recover it, when it had been ceded to creditors for a debt of her husband. The Roman Civil Law was in force at this time. *Louisiana Code*, 2412. 9 *Louisiana Reports*, 590, 602.

Winn and *Dunbar*, for the defendant, maintained, that Mrs. Pannell, divested herself of all title to the land in controversy, by relinquishing her dotal and paraphernal rights to all the property surrendered. This she did in the fullest manner. This property was, no doubt, paraphernal, and was susceptible of alienation by the wife with the consent of her husband. *Civil Code of* 1808, *page* 334, *article* 58. 3 *Martin*, 455.

2. It will then be seen, that the title to this property passed by the surrender of D. Pannell, to his syndics, for the benefit of his creditors, and shows that the plaintiffs are wholly without title, and cannot claim it, even admitting the sale made by the syndics was informal. The title remains in the creditors, and could only revert in any case, to the heirs of D. Pannell, if the creditors did not claim it. But

the plaintiff's claim in the right, and as the heirs of Mrs. Pannell. Her title is irrevocably gone by her relinquishment and receipt of the sum stipulated.

3. But even admitting the sale to be informal, Mrs. Pannell and her husband recognized it as valid by her becoming a purchaser of a slave, and receiving the sum of four thousand five hundred dollars, in lieu of all her rights and claims to the property surrendered. Having done so, her heirs who sue in her name alone, cannot interfere in the confirmation of this sale. They are without interest, and have no right to enable them to oppose its homologation. If the sale should be declared informal and set aside, the title to this property would vest in the creditors.

Mrs. Pannell made an advantageous contract with the creditors of her husband. She, by her relinquishment, gave up all her claim of sixteen thousand dollars, for the sum of four thousand five hundred dollars, which the creditors paid her.

Neither the wife or her heirs have made a retraxit of the relinquishment or renunciation; nor within the forty days after the act of 1835, as required by said act.

Bullard, J., delivered the opinion of the court.

This case appears before us in the form of a petitory action, engrafted on a monition under the act of 1834. The appellant having purchased at syndic's sale, a tract of land, in Opelousas, obtained by a monition from the clerk of the District Court, calling on all persons interested, who could set up any right, title or claim, in and to the property, in consequence of any informality in the order, or for any other defect whatsoever, to show cause why the sale should not be confirmed and homologated, in pursuance of the act of 1834. The land purchased is described as a tract of five hundred arpents on the bayou *Waxie* or *Wacksha*, confirmed to Mrs. Frances Pannell, in 1816.

The appellees came forward as the heirs at law of Mrs. Frances Pannell, the wife of David Pannell, by whom the land had been surrendered to his creditors under the act of

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1817, and opposed the homologation for the following reasons: 1st, because the land was the separate property of Mrs. Pannell, and was not legally sold as the property of David Pannell.

2d. That the land is situated in the parish of St. Landry, and could not be legally sold in the parish of Rapides.

3d. That the act of 1834, does not apply to a sale made before its passage.

4th. That all the proceedings under which the sale took place were irregular, illegal and void.

The heirs conclude by a prayer, that the court would proceed to a final adjudication as to the title to said tract of land, that they may be quieted in their title to the same.

The appellant, in answer to these allegations, avers, that the land in question, was surrendered by David Pannell to his creditors, and that it was sold for their benefit, and purchased by him; that Mrs. Pannell acquiesced in, and approved all the acts and proceedings, and that if she ever was the owner, she was divested of title; that she made an arrangement with the creditors of her husband after the surrender, by which she was secured and paid four thousand five hundred dollars for her claims, and in consideration thereof, she alienated and renounced to the creditors. He denies that she had any just claim upon the property, and he concludes by praying that he may be declared to be the legal owner.

It does not appear to us that the heirs of Mrs. Pannell, have any interest in opposing the homologation of the sale, because they do not claim through D. Pannell or his creditors, and they would gain nothing if the sale were declared irregular and null, inasmuch as the property would still remain that of the creditors. Their ground of opposition to the homologation, must, therefore, be disregarded, and the question of title alone considered, as between the heirs and the appellants.

The object of the monition act, was merely to provoke an inquiry into the legality of the proceedings which preceded or accompanied judicial sales, and the homologation of such

sales, has no other effect than to cure such nullities. It is irregular to cumulate a petitory action with the proceeding contemplated by that act in the shape of a reconventional demand; and if the objection had been made in this case, we should have thought it ought to have been rejected. But the appellant has chosen to answer to the merits, to assert title to the premises, as against Mrs. Pannell and her heirs, and to ask a recognition of his title.

Considering the action, therefore, as substantially petitory, it is manifest that the opponents must make out their title, and they can gain nothing by showing a defect in that of the appellant.

No primitive title in favor of Mrs. Pannell, is exhibited, but in the schedule of her husband, the tract of land surrendered by him to his creditors, is described as having been granted by the Spanish government to her, and he estimates the claims at five hundred dollars, which he supposed had never been confirmed. In the monition procured by the defendant, the land is described as a tract of five hundred arpents on the Bayou *Waxie*, confirmed to Mrs. Frances Pannell, on the 29th of March, 1816.

This evidence sufficiently shows, that the title to the land was originally in the ancestor of the plaintiffs, and it remains to inquire what evidence there is that it has been divested, and that the defendant is now the owner.

His counsel has contended, that by appearing at the meeting of creditors, and setting up a large claim, for which she insisted upon a general privilege upon all the property surrendered, but which she offered to relinquish in favor of the other creditors, except four thousand five hundred dollars, to be allowed her as privilege on all the moveables and immoveables of her husband surrendered, and by the acceptance of this proposition on the part of the creditors; and the payment of that amount to her, and in virtue of her subsequent formal relinquishment by notarial act, assisted by her husband, for that consideration, she is precluded from setting up any title to this part of the property embraced in the schedule.

The object of the monition act of 1834, is merely to provoke an inquiry into the legality of the proceedings which preceded or accompanied judicial sales, and the homologation of such sales has no other effect than to cure all nullities resulting from any informality in making the sale.

It is irregular to cumulate a petitory action with the proceedings on a monition to homologate a sale, in the shape of a reconventional demand. If the objection is made, the court will reject such a proceeding and demand.

If the opponents to a monition set up title in the nature of a petitory action, and the other party chooses to join issue on the merits, the court will proceed to try the case on the titles, as in a petitory action.

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It becomes necessary to examine the act passed before the notary, and to see to what extent the plaintiff's ancestor must be considered as having ceded and abandoned her right to the land in controversy. In that act she was assisted by her husband, and "declared and renounced, that she never will attempt to exercise any of her dotal or paraphernal rights on the property now surrendered to his creditors by the said David Pannell, further than the sum of four thousand five hundred dollars, etc., for the payment of which she is now exercising the rights of a tacit mortgage on all the property, real and personal, by her said husband to his creditors surrendered, etc." And she does further declare that she will never interrupt the said property when sold by the said syndics, further than the said sum of four thousand five hundred dollars, whether the same be purchased by one of the creditors of her said husband, or an indifferent person, hereby renouncing to all intents and purposes her dotal and paraphernal liens or mortgages on the same."

It is shown, that the sum stated as the consideration of this renunciation, was paid to her by the creditors, according to their agreement at a previous meeting.

By this contract, Mrs. Pannell not only renounces all her *dotal* or *paraphernal rights* on all the property surrendered, but she reserves the right of enforcing her lien upon it in the hands of the creditors, for the amount allowed her. It cannot be supposed that she intended to retain this tract of land, as paraphernal, and at the same time enforce her lien upon it as the property of the creditors under the surrender. Such pretensions are wholly repugnant to each other. She further engages never to disturb the purchasers of any part of the property surrendered. The latter clause in which she renounces her dotal or paraphernal mortgages, cannot be taken to limit or restrict her abandonment of all her rights first set forth in the act. No part of the surrendered property is excepted, and we are not to presume that the creditors would have paid her the amount, if they had understood at the time that she was to reserve any part as her separate property. From the terms of this contract the creditors had a

right to suppose, that in consideration of four thousand five hundred dollars, allowed her as a privilege, Mrs. Pannell intended to abandon all pretensions to the property included in the bilan of her husband. If in the first clause she had intended only to renounce her tacit mortgage, and not abandon the property itself, this last clause would have been useless. It is in this sense we are to suppose she intended the creditors should understand her at the time, and it is in that sense that she ought to be bound.

But it is contended, on the authority of the case *Gasquet* vs. *Dimitry*, 9 *Louisiana Reports*, 585, and numerous other cases, that she is not bound, because no legal remuneration was made after being informed by the notary, of the extent and nature of her marital rights. Those cases appear to us inapplicable to this. Mrs. Pannell, far from contracting jointly with her husband to pay his debts, was seeking to enforce her own claim as a creditor of her husband, and coming in collision with other creditors, whose debts from their character might absorb all the existing property of the husband, thought it prudent to compound for a part of her debt. That a wife may validly sell her paraphernal property or rights, is not doubted, and in such a contract, a formal renunciation is not required. The contract in this case, was onerous and commutative, by which the creditors for a specific price, acquired a right to the undisturbed enjoyment of the property under the engagement of Mrs. Pannell, never to disturb them nor their vendee, and we are of opinion, she and her heirs are precluded from setting up any title to the property in controversy.

The wife had the capacity even before the act of March 27, 1835, to make a valid renunciation of her dotal and paraphernal rights on property ceded by her husband to his creditors, when she appears with other creditors, and compounds with them for a part of her debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled and reversed; and it is further decreed, that there be judgment for the defendant, and that he be recognized as the owner of the tract of land in controversy, and quieted in his title and possession of the same, and that the appellees pay the costs in both courts.

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APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

Where the purchaser of a tract of land sells during the pendency of a suit to evict him, without recourse in warranty, and divests himself of all title before final judgment of eviction, *he is without interest*, and cannot claim of his vendor, a diminution of the price which he contracted to pay.

When the surety in an injunction is before the court on appeal, no judgment for interest or damages can be pronounced against him on dissolving the injunction.

The act of 1831, relative to injunctions, does not say from what date the interest is to run, when they are dissolved, but in this case it is computed from the time the judgment was rendered in the court below.

This suit commenced by injunction. The present plaintiff alleges, that in October, 1827, he purchased with full warranty, from one Stephen Tippett, an undivided half of a tract of 352 arpents of land, for which he gave his three several obligations to pay fifteen bales of cotton each, and payable on the 15th March, 1829–30 and 31. That two of these cotton notes have been paid, and the other transferred to one P. H. Hunter, now deceased, who instituted suit thereon, and prosecuted the same to final judgment. See the case in 3 *Louisiana Reports*, 97.

He further shows, that at the time said suit was pending, he was also sued for the land in question, by one Wall, and was in great danger of eviction, which he pleaded in defence of the suit on the cotton note. That Wall has obtained final judgment, and evicted him from about 115 or 120 arpents of the land. See the case in 10 *Louisiana Reports*, 339. That notwithstanding all this, Hunter's heirs have taken out execution, and are about coercing the payment of their judgment, which he prays may be enjoined perpetually.

He further shows and alleges, that in consequence of said eviction, he is entitled to have the obligation sued on by Hunter cancelled, as Tippett from whom Hunter received it,

sold to him with full warranty, and neither him or his assignee are entitled to receive its amount.

The defendants pleaded a general denial, and admit their ancestor was the assignee of Tippett, from whom he received the obligation sued on; but they expressly deny that the plaintiff has any right to withhold payment, as the suit between him and Wall was merely an action of boundary, and did not operate an eviction. That there is another instalment of the price not yet paid, which is sufficient to defray all expenses and damages occasioned by the suit of Wall.

They further aver, that the plaintiff was not the owner or possessor of the land, at the time said suit of Wall was decided, but had sold all his interest therein to one William J. Morris without recourse in warranty; and thereby barred himself of any claim in warranty, on account of his purchase from Tippett; and also lost any claim for indemnity on account of eviction. That he sold to Morris, expressly exempting himself from any claim or recourse in warranty, and in reference to such decision as the Supreme Court might render in the case of Wall against Spurlock. Upon these pleadings and issues the cause was tried.

The evidence showed that the sale from Tippett to Spurlock in 1827, is of "an undivided half of a tract of land, situated and fronting on Little Lake, adjoining lands of Overton and others, containing 352 arpents, being the same acquired from his father, Stephen Tippett, &c." Tippett warrants the premises "against the claim of himself and heirs, and of all persons claiming under or from him, and against the claims of all persons whatever, etc."

In June, 1835, after the suit of Wall *vs.* Spurlock for a part of this land had been decided in favor of Wall in the District Court, pending the appeal, Spurlock sells all his right, title, interest and claim to the land, to William J. Morris for four thousand dollars, giving the same description as in the deed from Tippett to him; and he "expressly declines and absolutely refuses to warrant it against the claim of any other person whatsoever, etc."

It further appeared that Wall's judgment took about 115

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arpents of the land, as the plaintiff had claimed it, but there was evidence to show that Tippett and Spurlock had had it improperly located, and that this judgment only restored the respective claims to their true location and boundaries. But the plaintiff contended that he had been evicted of these 115 arpents, and claimed a diminution of the original price under the sale from Tippett to him.

The judgment which Hunter had obtained, was for five hundred and seventy-two dollars, with five per cent. interest, from the first of March, 1830, until paid; which sum was ordered to be deposited in court, to abide the decision of the suit of Wall and Spurlock.

The district judge rendered judgment, perpetuating the injunction, from which the defendants appealed.

Hyams for the plaintiff.

I. The defendants oppose the legality of the injunction on the ground that Spurlock sold *without warranty* for a large sum, and therefore has no interest in opposing this payment, because if he had paid Hunter he could not have received back the amount, having no interest in the eviction of his vendee, and quotes 3 *Martin, N. S.*, 421. *Pothier, Vente* 98. *Digest l.* 21, *tit.* 2, *l.* 61, 71.

I will meet these objections in detail.

1. Spurlock was the party evicted *on the record, and in fact* although he did sell to Morris pending *the appeal*, and without warranty any right or title he had to the land; but whether he was or not, he had an interest in not paying Hunter because he had not received full value. If he had received full value by having had a good title to his land, so as to have been able to have sold *with warranty*, he would have sold for many thousand dollars more than what Morris gave him for the *chance* of a reversal by the Supreme Court of the judgment of eviction against him by the District Court.

2. Tippett who sold to Spurlock with warranty, a tract of land which ultimately proved to be very valuable, but which to the plaintiff here (Spurlock) was lost for want of a good title in Tippett, cannot certainly complain that Spurlock gained

something at the last moment by selling a mere chance. On the contrary, Spurlock is the sufferer for want of a good title, and has a right to refuse to pay Tippett or his assignee, Hunter, which is the same thing.

3. Spurlock had a clear legal right to retain a portion of the purchase money, when the suit of eviction of Wall was instituted against him, until the decision of that suit, and the judgment of the Court in the case of Hunter *vs.* Spurlock, 3 *La. Rep.* 97, sanctified that right and is *res judicata* and conclusive. The eviction has made the contingent deposit revert to him. Now what act of his with third persons can give Hunter any greater legal or equitable claims upon him than he had at the day of the rendition of the judgment in the case of Hunter *vs.* Spurlock?

II. The facts of the case do not come within the principle said to be laid down by the Supreme Court in 3 *Martin, N. S.*, 421; and *Pothier*, and the *Digest;* but even the principle itself is controverted by *Troplong*, *Vente*, 429, who says the *Digest* is misquoted by *Pothier*; and also by *Duranton, vol.* 16, *No.* 276, who differs with *Pothier.* That doctrine would certainly be a singular one which only benefited the party who is substantially in fault, to wit, Tippett, who sold to us *with* warranty, but with a *bad* title.

Winn, for the defendant, insisted that Spurlock was not evicted by the judgment in the case of himself and Wall, for there was still land enough for Spurlock according to his original purchase from Tippett, if it was properly located. That suit was not in fact a petitory action, but one of boundary, and although Wall recovered, yet it was not an eviction, as it only settled the boundaries between them. It only changed Spurlock's boundary.

2. The suit of Hunter was on the second instalment due from Spurlock to Tippett, leaving still a third unpaid, which was sufficient to cover all the damages the plaintiff could sustain by the judgment of Wall. He should resort to this one and claim diminution in consequence of his eviction, if he has sustained any real loss.

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3. But Spurlock was not, in fact, evicted. He had sold pending the appeal, to Morris, without any recourse on him in warranty for a good price. This sale was made before the decision of the suit of eviction, and consequently Spurlock was without interest in the result. He cannot, therefore, set up any claim for a diminution of price, and has no right to oppose the judgment of the defendants. *Pothier de Vente, No.* 97. 3 *Martin, N. S.*, 422.

Bullard, J., delivered the opinion of the court.

The present plaintiff having been sued by the ancestor of the defendants, pleaded that the obligation upon which the suit was brought, was given for a part of the price of a tract of land. That he was in danger of eviction of a part of the land, in consequence of an action of boundary instituted by one Wall, and then pending; and that if he should lose a part of the land for which the note was given, he would be entitled to a diminution of price. Judgment was finally rendered in favor of the plaintiff for the amount of the note, but the defendant was ordered, in conformity to article 2536 of the code, to deposit the amount thus recovered with the clerk of the court, and in default of his making such deposit, that the land be seized and sold by the sheriff to satisfy the judgment, and that he deposit the same with the clerk.

The defendant in that case having failed to deposit the money, the sheriff proceeded, the land was seized, sold at a year's credit, and purchased by the defendant himself, who gave a twelve months' bond. An execution having issued on this bond, the sheriff was arrested by an injunction obtained by him on the following allegations among others, to wit; that since the rendition of the judgment in favor of Hunter, the case of Wall *vs.* Spurlock had been finally decided by the Supreme Court, and he had been evicted of about one-third of the land sold to him, whereby he is entitled to have the note sued on by Hunter cancelled, etc.

The defendants, in answer, deny that the plaintiff in the injunction has been evicted of any part of the land purchased by him, alleging that the action instituted by Wall was one

of boundary alone. They further allege, that the plaintiff is no longer the owner of any part of the land, and that he had sold the same to one Morris without any warranty, and that thereby he is debarred from setting up any claim for warranty himself, and has lost any claim to indemnity on account of the supposed eviction.

The injunction was perpetuated, and the defendants appealed.

The original judgment certainly contemplated that the money should be brought into court to abide the final decision of the case of Wall *vs.* Spurlock, and it does not appear that the twelve months' bond was to be considered as money, by agreement of parties. But as the pleadings in this case present the question as if the money were in court, and as if the court was now called upon to say whether the plaintiff has a right to withdraw any part of it on account of the eviction, we see no objection to deciding in that form upon the rights of the parties, instead of dissolving the injunction, and leaving the question open until the money shall be deposited, according to the judgment in the first instance.

The record shows, that pending the suit of Wall *vs.* Spurlock, the plaintiff sold the land in controversy to Morris, expressly exempting himself from all obligations as warrantor, except as against himself and his heirs, and the purchaser declared in this act of sale, that he was well acquainted with the title, and aware of the danger of eviction, and was contented to take the land with such limited warranty.

Where the purchaser of a tract of land sells during the pendency of a suit to evict him, without recourse in warranty, and divests himself of all title before final judgment of eviction, *he is without interest*, and cannot claim of his vendor a diminution of the price which he contracted to pay.

It is clear, therefore, that Spurlock has not been evicted. Having divested himself of title before the final judgment in that case, if he had sold with warranty, the eviction of his vendee would have entitled him to a diminution of price, perhaps, on a recourse in warranty against his vendor, but having sold without any warranty, his vendee cannot maintain any action against him, and he is without interest. 3 *Martin, N. S.*, 422. *Pothier, Vente* 97.

But it is urged on the other side, that this doctrine of Pothier is successfully combatted by more modern commenta-

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tors on the Code Napoleon, and we are referred to Duranton and Troplong.

The general principle laid down by Pothier is, that the eviction suffered by the successor of the purchaser, gives rise to the action of warranty only so far as that eviction interests the purchaser or his heirs, and he supposes the case of a donation, and the eviction of the donee, and concludes that as the donor is not bound by any warranty, the eviction suffered by the donee interests neither him nor his heirs, and consequently that he cannot exercise the action of warranty against his vendor.

Paulus, it is true, thinks that when the purchaser has given the property purchased as a dowry to his daughter, and she is evicted, the father ought to have the action of warranty, because he has an existing interest that his daughter should not be without a dowry, even in case he would not be entitled to a return of the dower, in the event of her death during the marriage. *Digest lxxi., t. ii., law* 71.

The reason given by Paulus, to wit, that the donor, in the case supposed, has still a subsisting interest, would seem to admit the general principle that when the purchaser has no longer any interest, he cannot exercise the action.

Duranton and Troplong maintain the opinion of Paulus, in opposition to that of Pothier, in the single case of a donation; they appear to think that the donee has an action of warranty against the vendor of the donor. But that is not the case now before the court. The question is not whether Morris, who purchased at his risk, has, under the terms of his deed, any subrogation to the warranty of Spurlock, but whether Spurlock, after parting with all his right, title, and interest, can exercise any action on account of the eviction of his vendee. Neither of the authors cited appear to controvert the position in relation to a sale.

When the surety in an injunction is before the court on appeal, no judgment for interest or damages can be pronounced against him on dissolving the injunction.

The injunction, in our opinion, ought to have been dissolved, on the merits, and it is our duty to pronounce such judgment as ought to have been rendered below. But the surety on the injunction bond is not before us, and no judgment for interest or damages can be pronounced against him.

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The act of 1831 relative to injunction, does not say from what date the interest is to run, when they are dissolved, but in this case it is computed from the time the judgment was rendered in the court below.

The act of 1831 (page 102, section 3,) makes it the duty of the court, in case the injunction be dissolved, to condemn the plaintiff and surety *in solido* to pay interest at the rate of ten per cent. per annum, and damages not exceeding twenty per cent., unless damages to a greater amount are proved. The act does not say from what date the interest is to run, and in the present case we think it should run from the time judgment was given below on the injunction. There is no sufficient evidence of special damages.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be avoided and reversed; and proceeding to render such judgment as ought, in our opinion, to have been given below, it is further adjudged and decreed, that the injunction be dissolved, and that the defendants recover of the plaintiffs ten per cent. interest on the amount due upon the twelve months' bond from the 22d of May, 1838; and it is further ordered, that the sheriff proceed to make the money, and pay it over to the defendants, and that the plaintiffs pay costs in both courts.

WARD'S HEIRS *vs.* BOWMAR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF OUACHITA.

If the citation of appeal wants the seal of the court from which it issued, it is insufficient, and the appeal will be dismissed on motion by the appellee.

The irregularities of bringing up the appeal and citing the appellee, are none of them waived, by filing *any grounds* for the dismissal of the appeal.

This suit commenced in an opposition made by the heirs of Ward to a monition taken out by R. H. Bowmar to per-

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fect the sale of a tract of land, sold at the probate sale of John Ward's estate.

After hearing the evidence and the parties, the probate judge gave judgment overruling the opposition, sustained the intervention of Guice, and homologated and confirmed the sale. The plaintiffs in opposition appealed.

Downs, for the appellees, moved to dismiss the appeal, for want of the seal of the court authenticating the citation.

2. Because the citation of appeal was not served on the real party in *interest*, (Bowmar,) who is the appellee, until the 18th September, when the appeal was returnable to the 1st of October following, thereby allowing him only fourteen days to appear and answer, instead of twenty-six days, the time allowed by law to appear and answer to the appeal.

3. The return of the service of citation was illegal, not being made in the petition, as the law requires.

4. So far as the appellant, Smith, is concerned, (who married one of the heirs of Ward, he has no right to appeal for his wife; she ought to have appealed, authorized by her husband, the suit being for the title to real property of the wife.

M'Guire, for the appellants.

Martin, J., delivered the opinion of the court.

The dismissal of the appeal is prayed for on the ground "that the citation is not authenticated by the seal of the court."

2. That there was not sufficient time elapsed between the service of citation and the return day thereof.

3. The appeal was irregular as to Smith, who had no legal right to appeal for his wife; but that she ought to have appealed with the authorization of her husband, the suit being for the title to real property of the wife.

If the citation of appeal wants the seal of the court, from which it issued, it is insufficient, and the appeal will be dismissed on motion by the appellee.

On the first ground the appeal must be dismissed, for this case cannot be distinguished from that of Campbell, Ritchie & Co. *vs.* Karr, 7 *Louisiana Reports*, 70.

The irregularities of bringing up the appeal and citing the appellee, are none of them waived, by filing *any grounds* for the dismissal of the appeal.

This renders it useless to examine any of the other grounds; but the counsel for the appellants contends, that all the informalities in the citation and the service thereof are waived, by the third ground of dismissal, which he alleges is a plea to the merits.

It appears to us that the irregularities of the citation are not thereby waived. It is only a third ground of dismissal entirely independent of the two others. It is a substantial ground of dismissal, that the appeal has been taken by a person who has no right thereto; and in order to show this, the appellee may, without submitting the case on its merits, allege that the right of appeal is in another.

The appeal must, therefore, be dismissed, with costs.

HOOD *vs.* M'CORKLE.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE PARISH OF CARROLL, THE JUDGE OF THE SECOND PRESIDING.

In this case the evidence being insufficient to decide it on the merits, it was remanded for a new trial.

This is an action to recover the value of a slave belonging to the plaintiff, and killed by the defendant.

The plaintiff alleges, that the defendant killed his slave Henry, a good and peaceable servant, without any just or legal cause whatever, and refuses to pay the value thereof. He alleges his value to be seventeen hundred dollars, for which he prays judgment.

The defendant admits he killed the slave in question, but avers he was a runaway, defying the law and refusing to submit when ordered. That the slave was found quarrelling with the hands under his management as overseer, and was not

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on the plaintiff's plantation, but was shot while in the act of brandishing a large knife, and threatening the life of the defendant. He prays that the demand be rejected.

Upon this issue the cause was tried by a jury. The evidence showed that plaintiff's slave came in at 12 o'clock, and weighed his cotton and went off. In about two hours the overseer missed him, and went to one or two of his neighbor's and told them the slave Henry he expected had run off, and desired them (and among others the defendant, who was overseeing for one Chambliss, adjoining) to accompany him the next day in search of the slave. That same evening the slave was discovered quarrelling with the slaves of Chambliss, and had a butcher knife in his hand. The defendant was sent for in a hurry, and on coming up the slave ran, and on getting over into plaintiff's field and refusing to stop on being ordered, the defendant shot him down on the spot.

On this evidence, and after the arguments of counsel, the jury returned a verdict for the defendant. After an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

M'Guire, for the plaintiff.

Downs, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff in this case seeks to recover the value of his slave, killed by the defendant. The latter pleaded in justification, that the slave was a runaway, and refused to submit; and that he was armed with a large butcher knife, which he brandished at the defendant, and threatened his life. There was a verdict for the defendant, and the plaintiff appealed.

His counsel has contended, that according to the 32d section of the Black Code (1 Moreau's Digest 108) freeholders alone have a right, in the case of a slave being found absent from his usual place of working or residence, unaccompanied by any white person, and refusing to submit to examination, to seize and correct said slave, and if the slave shall resist or attempt to make his escape, to make use of arms, but at all

events to avoid killing him, unless assaulted and stricken by the slave. He contends that the justification is therefore unsupported by evidence, there being no proof either that the defendant is a freeholder, or that any assault was committed upon him.

The authority cited by the counsel for the appellee from the same work, page 24, appears to us to relate only to the right of the owner to be paid by the state, for a slave killed while run away.

It appears to us the case should be remanded for a new trial.

In this case the evidence being insufficient to decide it on the merits, it was remanded for a new trial.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, the verdict set aside; and it is further ordered, that the case remanded for a new trial, and that the costs of appeal be paid by the appellee.

M'GUIRE, CURATOR AD HOC, ETC. *vs.* ROSS, TUTRIX, ETC.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF OUACHITA.

A curator *ad hoc* cannot be legally appointed to prosecute the removal of a tutor or tutrix from office, when there is an under tutor in office. He alone can be authorized to act.

The intervention of one of the minors after her emancipation by marriage, cannot cure the nullity resulting from the appointment of a curator *ad hoc* to remove the tutor, when there is an under tutor.

A curator *ad hoc* under a void appointment cannot require the tutor to render an account, or make opposition to it when rendered.

This suit was instituted by the appointment of R. F. M'Guire, curator *ad hoc*, by the judge of probates for the Parish of Ouachita, with directions to prosecute the removal

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from office, of Mrs. Elizabeth Ross, tutrix of her minor grand children, for malfeasance in office, and to require her to render an account of her administration.

The defendant excepted to the appointment of a curator *ad hoc* to prosecute her to removal from office, because if it became necessary to institute this proceeding, the under tutor was the proper person to act.

On the trial, this exception was overruled by the court, and the defendant appealed.

M'Guire, in *propriâ personâ*.

1. We contend that the judge who appointed the tutrix, alone has the power to compel her to account, *Code of Practice* 997; and to remove her for legal causes, *Ibid* 1013. That the article 1016 is directory to the judge and not imperative, and he is not bound to wait for the under tutor if he neglects his duty. The appointment of curator *ad hoc* was therefore correct. *Bird* vs. *Black*, 10 *La. Reports*, *page* 82.

2. That the under tutor has no right to approve or disapprove of the account rendered by a tutor, *Louisiana Code* 300 *to* 304. This becomes the duty of the court, *Code of Practice* 1001 *to* 1007, and the judge may appoint auditors or other persons to examine the account. In this case, he entrusted that duty to the curator *ad hoc*.

3. If the court should adjudge that the appointment of a curator *ad hoc* was wrong, this proceeding *must be sustained*, as during the pendency of the action one of the minors married, upon which the tutrix prayed an abatement of the suit as to her, when the husband came in and became a party to the suit, and adopted the pleadings of the curator *ad hoc*, and now joins with him as a party in this court.

Garrett for the defendant, insisted that no curator *ad hoc* could be appointed, when there was an under tutor in office. *Louisiana Code*, 301. *Code of Practice* 1013, 1016.

2. The case of Bird's Heirs *vs.* Black, 10 Louisiana Reports, 83, does not establish the general principle that a curator *ad hoc* must be appointed in every case. It merely refers to cases where there is no under tutor.

3. This court has decided that the under tutor was bound to prosecute the removal of the tutor, when ordered to do so by the judge, and that he could not appeal from the order. 11 *Louisiana Reports*, 39.

Bullard, J., delivered the opinion of the court.

The appellee, under an appointment from the Court of Probates as *curator ad hoc*, instituted the present proceedings to remove the defendant from the tutorship of her minor grand children, and to cause her to render an account. She set up as an exception that, a curator *ad hoc* could not be appointed in the case before the court, there being an under tutor legally appointed for the minors to wit, John S. Lewis, whose duty it is to act for said minors, whenever their interests are in opposition to those of the minor.

A curator *ad hoc* cannot be legally appointed to prosecute the removal of a tutor or tutrix from office when there is an under tutor in office. He alone can be authorized to act.

The court, in our opinion, erred in overruling this exception and proceeding further in the premises. The Code of Practice provides that the judge, when made acquainted with the facts rendering it proper to remove a tutor, if he thinks there is probable cause for removal, shall direct the under tutor to prosecute his removal; or if the minor has no under tutor he shall then appoint a curator *ad hoc* to commence the action. *Article* 1015, 1016.

The minors, it is shown, had an under tutor, and consequently he alone could be authorized to act.

The intervention of one of the minors after her emancipation by marriage, cannot cure the nullity resulting from the appointments of a curator *ad hoc* to remove the tutor, when there is an under tutor.

The appellee contends, that article 1018 authorizes any heir, creditor or other person concerned, to provoke the removal of curators of vacant estates and of absent heirs, testamentary executors, or other administrators of estates, and that tutors may well be embraced under the general description of administrators. We are of opinion that the special provision in relation to the removal of tutors is not modified by this latter general provision.

A curator *ad hoc* under a void appointment cannot require the tutor to render an account, or make opposition to it when rendered.

The intervention of one of the minors after her emancipation by marriage pending the suit, cannot in our opinion cure this nullity. The appellee being without authority under a void appointment to prosecute the removal of the tutrix, could

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not require her to render an account of her administration, nor make opposition to it when rendered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; and it is further ordered, that the suit be dismissed with costs in both courts.

TERRILL *vs.* CHAMBERS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT FOR THE PARISH OF RAPIDES, THE JUDGE OF THE FIFTH PRESIDING.

On the passage of the act of congress, in 1832, allowing the front proprietors a *preference* in becoming the purchasers of any vacant land adjacent to and back of his own tract, he acquires, from the time of its passage, an inchoate right, and can maintain an action for damages for waste committed on this land, before entry and purchase by him.

When the front proprietor acquires title from the United States to the *back concession*, since waste has been committed, the party committing it is thereby liberated from any claim which the latter, (*i. e.* the United States,) might have against him for damages. He cannot be liable to two parties for the same injury.

This is an action of waste, to recover damages of the defendant for cutting and taking timber from a back concession of land, which the plaintiff alleges lies immediately behind his front tract, and to which he is entitled by preference, and has made all the necessary preparations to enter and purchase it from the government of the United States. He further shows, that the defendant has committed waste, by cutting and carrying away timber from said land, to his damage three thousand dollars, for which he prays judgment.

The defendant denied that the plaintiff was either the owner or possessor of the land in question, and that he could not maintain this action. That if any timber was taken from said land, as stated, more than a year has elapsed since the alleged trespass, and that the action is prescribed by the lapse of one year.

Upon this issue the case was submitted to a jury, who, on the evidence adduced, returned a verdict for the plaintiff of eight hundred and seventy dollars, and costs.

The evidence showed that Chambers' hands, under his orders, had been in the habit of cutting and hauling timber from the back concession of the plaintiff's land, which was adjoining, before the latter completed his purchase of this concession from the United States. The trees were cut in the summer, in June and July, 1833. There were 140 trees ascertained to be cut, besides many fresh stumps of others not counted. The trees were estimated by the witnesses to be worth ten dollars each, being very large and long-bodied.

Terrill showed, by the register's and receiver's certificate and receipt, that he made his application to enter this land the 28th February, 1834. The receiver's receipt for the price is dated September 16th, 1834. This suit was instituted the 14th April, 1834.

From judgment confirming the verdict, the defendant appealed.

Winn, for the plaintiff, said this was an action of trespass and for damages, for entering on plaintiff's back concession and cutting timber, and committing waste thereon. The evidence showed, that the defendant had cut and took off valuable cypress timber, which was estimated by the jury at eight hundred and seventy dollars in damages.

3. The plaintiff was entitled to this back concession from the passage of the law of congress, in 1832, and could maintain trespass even before payment of the government price. In actions of trespass, title is not inquired of. Title, or possession either, will support this action.

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Brewer and *Dunbar*, for defendant. The act of congress only gave the right to back concessions, on certain conditions, which the front proprietor might accept or not. Until he accepted and complied with the conditions, he had no right to the use or possession of the land. The waste complained of in this case, appears to have been done before any entry or purchase by the plaintiff. If any one can complain, it is the United States. The defendant is not liable in this case.

Martin, J., delivered the opinion of the court.

The plaintiff states himself to be the owner of a tract of land, and as such entitled to acquire, under the act of congress, what is commonly called a "back concession," which he has not been able to effect, because the government has never offered the land for sale. That he has had it surveyed, and filed his application in the proper office, and taken actual possession of the same: And that the defendant, well knowing this, and notwithstanding his remonstrances, has committed waste on the premises, by cutting down and carrying away much valuable cypress timber.

The defendant pleaded the general issue and prescription; and that the plaintiff could not maintain his action, because he was neither the owner or possessor of the *locus in quo*. There was a verdict and judgment for the plaintiff, and the defendant appealed.

It appears the plaintiff made his application to enter the back concession on the 28th February, 1834, and shows payment the 16th September following. The waste complained of was committed in the summer and fall of 1833. The suit was brought in April, 1834. It is contended that the plaintiff cannot recover, because his application for the back concession was not filed until several months after the waste was committed; and that, before this application, the plaintiff was without a shadow of title to the premises. The act of congress, passed in March, 1832, provides that the owner of a tract of land bordering on any river, bayou, etc., shall be entitled to a *preference in becoming the purchaser* of

any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpents. This was the plaintiff's case, of which he afterwards availed himself. See *Session Acts of Congress* 1832, *page* 96.

On the passage of the act of congress in 1832, allowing the front proprietors a *preference* in becoming the purchasers of any vacant land adjacent to and back of his own ttact, he acquires from the time of its passage, an *inchoate* right, and can maintain an action for damages for waste committed on this land before entry and purchase by him.

On the passage of the act of congress, authorizing the plaintiff to enter the back concession, he acquired an inchoate right thereto, which might be the object of an immediate sale. He had, therefore, at once a claim for damages against any one, who, by a tortious act, impaired that right. If by a waste committed on the premises, he was prevented from obtaining the price which he could have received if the waste had not been committed, and was compelled to sell his right at a reduced price, there cannot be a doubt that he might have claimed damages under the 2294th article of the Louisiana Code. This article provides, that "every act whatever, of man, that causes damage to another, obliges him by whose fault it happened, to repair it."

The defendant could not resist the action of the plaintiff, on the ground that until the United States were divested of title to the land, he was liable to them in damages if they sought to claim any by a civil suit; or to pay the penalty denounced by the laws of congress against trespassers on the public lands. The plaintiff could not, on that account be deprived of the remedy which the law gave him for the injury he had sustained. It is true he was not compelled, in the present case, to sell his right at a reduced price, but this right was impaired by the impossibility in which he was placed, by the tortious or unlawful act of the defendant, of availing himself of all the advantages which would have resulted to him from the acquisition of the back concession, if the value of the land had not been diminished by the waste.

When the front proprietor acquires title from the U. States to the *back concession*, since waste has been committed, the party committing it is thereby liberated from any claim which the *latter* (i. e. the United States) might have against him for damages. He cannot be liable to two parties for the same injury.

If, since the waste, the plaintiff having acquired the title of the United States, the defendant is thereby liberated from any claim which they might have against him for damages, he is also deprived of a plea which, however plausible, we have said would be ineffectual, to wit: that he cannot be liable to two parties for the same injury.

The amount of damages was a peculiar object of consideration for the jury, and we are not prepared to say that the verdict ought to be disturbed on that account.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TERRILL *vs.* CHAMBERS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

The proceedings instituted by a proprietor of land, before the register and receiver, to inquire into the titles of his neighbor's land, arising on *confirmed claims*, although they cause much trouble and expense to the adverse party, form no claim for damages, when it is not shown they were prompted by malice.

When excessive damages are given, the verdict and judgment will be set aside, and the case remanded for a new trial.

This is an action of boundary and jactitation of title, in which damages are claimed. The plaintiff alleges that he is part owner of six hundred arpents of land, on the left bank of Bayou Robert, descending, the title to which, by several mesne conveyances was derived from the late Dr. John Towles; that this tract is bounded below by lands formerly owned by W. H. Cureton, but now the property of the defendant; that said Towles sold two hundred and ninety-four arpents of the lower part of said tract to N. Cox, which, by several mesne conveyances, became the property of defendant; and the upper part to Wm. Miller, from whom, through several conveyances, he derives title.

The plaintiff further shows, that the defendant has trespassed on his lower boundary, and claims the whole of this

tract to his damage, five thousand dollars; that the defendant has slandered his title by publicly declaring he has a better title, and he has been requested to desist or bring suit and try the title to the same, which he has refused.

He further states, that there has never been a boundary line established between him and the defendant, separating the respective portions purchased originally from said Towles. He prays that a permanent boundary be fixed; that he be quieted in his title, and have judgment for his damages sustained in the premises.

The defendant pleaded a general denial, and averred that he is the party aggrieved; that he is the owner of the balance, and upper part of the Towles' tract, having purchased the whole of it at the sale of Havard's succession in 1830. He further shows, that this sale includes three tracts, described in a decision of the Supreme Court, in the cases of Turnbull against Cureton, etc. 9 *Martin*, 37.

He prays that a boundary be established between him and the plaintiff, and for five thousand dollars in damages.

The case was tried before the court and a jury, on these pleadings and issues.

The evidence showed, that the defendant instituted proceedings against the plaintiff, before the register and receiver at Opelousas, under an act of congress, and had been cited there relative to the conflicting claims of their lands, which caused trouble and some expense to him, in sending his lawyer, to whom he paid two hundred dollars; and finally, the register and receiver refused to act in the matter. It further appeared, the defendant rode on to the plaintiff's premises, where his overseer and negroes were at work, and rose up in his stirrups and ordered them off, alleging, that the land was his. But this interruption only lasted about fifteen or twenty minutes. On the trial the defendant introduced no evidence. The jury returned a verdict for the plaintiff of sixteen hundred dollars in damages. From judgment rendered thereon the defendant appealed.

Hyams, for plaintiff, insisted, that the conduct of the

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defendant was wanton and malicious, and had caused great trouble, expense and injury to the plaintiff, for which he was entitled to exemplary damages.

2. These proceedings could not be excused or justified, on the ground that the boundary lines between the parties were not settled and fixed. On the contrary, the decision of this court in the cases of Cureton and Turnbull, in 9 Martin 37, settled all the conflicting claims to the respective tracts of land between them.

3. The plaintiff has proved that he paid two hundred dollars, besides other expenses and trouble in attending before the register and receiver, at Opelousas, all of which was vexatious and uncalled for, and is ground for damages.

Brewer and *Dunbar*, for the defendant, contended, that the difficulties between the parties in this case, arose from conflicting claims to adjoining tracts of land. The proceedings at Opelousas, were fully authorized by a law of congress, to adjust the surveys and titles in relation to all *confirmed claims* as may conflict, or in any manner interfere with each other. The defendant had a right to institute these proceedings, whether they were successful or not, and they do not present a claim for damages. See *Acts of Congress*, 1831, *sec.* 6, *page* 111, 12.

2. The trespass complained of is a mere trifle, as shown by the evidence. No damage or injury whatever was sustained; and the jury must have been led away by their feelings against the defendant, because he is represented as rich, and the other poor. The damages are excessive and unjust, and the verdict and judgment should be reversed.

Carleton, J., delivered the opinion of the court.

The plaintiff avers, that he is the owner of a tract of land, described in his petition, which, he alleges, the defendant invaded, without any right or title whatever, and interrupted the labor of petitioner's slaves, by ordering them and his overseer to quit the premises, by which he has been endamaged in the sum of five thousand dollars; that the defendant pub-

licly slandered his title, and caused proceedings to be instituted at Opelousas, to induce the United States government to deprive him of his land; that the defendant will not desist from his unjust pretensions, nor bring an action to establish his title; but has driven the petitioner to the expense and trouble of instituting suit to maintain his rights, whereby he has sustained damage in the further sum of five thousand dollars; and concludes with a prayer that the defendant be decreed to exhibit his title, if any he have, or that he be enjoined from setting up further pretensions to the land; that the petitioner be quieted in his possession; that he have judgment for the sum of ten thousand dollars damages; that a boundary line be established between the parties, and for general relief.

The defendant, for answer, denies generally, and avers that he is the owner of the land in question, as purchaser, at the sale of the succession of John Havard, deceased; prays likewise for the establishment of the boundary line; that he be quieted in his possession, and reconvenes the plaintiff in the sum of five thousand dollars damages, for his illegal detention and cultivation of the land during three years.

The jury found a verdict in favor of the plaintiff, assessing his damages at sixteen hundred dollars.

The court pronounced judgment for that sum, and furthermore decreed that the plaintiff be quieted in his title and possession.

The controversy in this case, turns entirely upon the question of damages; and is, therefore, the only point in the cause necessary for us to notice.

It appears from the facts disclosed at the trial before the District Court, that the defendant was informed by the surveyor general at Donaldsonville, that the register and receiver of the proper districts, were authorized by an act of congress of 1831, to inquire into titles in cases arising on confirmed claims; that Chambers accordingly presented a petition to that effect to the register and receiver of the land office at Opelousas, and caused Terrill to be cited to appear before them on the 31st day of March, 1836; that being

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unwell, he sent his agent to Opelouses to attend to this business, and employed counsel to whom he paid two hundred dollars. It appears, on the arrival of the agent at Opelousas, the register and receiver refused to act. It also appears, that while Mr. Wise, the plaintiff's overseer, was employed cutting wood, with several slaves, on the land in dispute, Chambers rode up and ordered them off, rising in his stirrups and lifting his whip, so that the negroes ceased from their work; and directed the witness to tell Terrill to meet him there the next morning to settle the business; that the hands were very much alarmed, but did not stop from their work more than fifteen minutes.

The proceedings instituted by a proprietor of land, before the register and receiver, to inquire into the titles of his neighbor's land, arising on *confirmed claims*, although they cause much trouble and expense to the adverse party, form no claim for damages, when it is not shown they were prompted by malice.

We have not been able to procure a copy of the act of congress, under which the proceedings at Opelousas were had; and cannot, therefore, understand the nature of the powers with which those officers are clothed. We are, however, of opinion, that these proceedings form no just claim for damages on the part of the plaintiff. From the documents on file, we think the defendant might well be mistaken as to the precise nature of his title. It is not shown that he acted in malice, and if he caused trouble and expense to the plaintiff, it was not with the intention to injure him, but to establish his own rights, with no less trouble and expense to himself.

With respect to the alleged trespass, by interrupting the labor of plaintiff's slaves, for only fifteen minutes, we think the injury too trifling to be a subject of serious complaint; and although we would disturb the verdict of a jury, assessing damages with great reluctance, yet where such damages are excessive, and altogether unsupported by testimony, as in the case now before us, it becomes our duty to set it aside and remand the cause to be *tried de novo*.

When excessive damages are given, the verdict and judgment will be set aside, and the case remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the verdict of the jury be set aside; that this cause be remanded for a new trial, the appellee paying the costs of appeal.

LAFERRIERE *vs.* BYNUM ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE SEVENTH PRESIDING.

Where the petition alleged "that at the proper time, due and legal demand was made of payment of the note, at the proper place, and payment refused,"—the note being annexed as part of the petition, it was deemed a sufficient allegation of a demand to let in proof of it.

This is an action against the makers and endorsers of a promissory note, payable at the Bank of Louisiana, in New-Orleans.

The plaintiff alleged, that payment was legally demanded, at the proper place and refused, of which demand and refusal due and legal notice was given to each of the endorsers, etc. The note and protest were annexed, and made a part of the petition.

Two of the defendants excepted to the plaintiff's petition, on the ground that there was no legal demand, and no allegation of demand was made in the petition.

The exception was overruled, and from judgment rendered therein the defendants appealed.

Winn, for the plaintiff.

Dunbar, contra.

Carleton, J., delivered the opinion of the court.

This action is brought by the endorser of a promissory note, made payable on its face at the Bank of Louisiana, in New-Orleans. The note is annexed, as making a part of the petition, in which the plaintiff avers, "that at the proper time, due and legal demand was made of the payment of said note, at the proper place, and payment refused."

Where the petition alleged that at the proper time, due and legal demand was made of payment of the note at the proper place, and payment refused, the note being annexed as part of the petition, it was deemed a sufficient allegation of a demand to let in proof of it.

Two of the defendants, Thomas J. Wells and James D. Spurlock, after pleading the general issue, allege, that no demand of payment has been made at the Bank of Louisiana, in the city of New-Orleans, where the note sued on was made payable, and that no allegation of said demand is made in plaintiff's petition.

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There was judgment against all the defendants, two of whom, Wells and Spurlock, appealed.

At the trial of the cause, the plaintiff offered evidence to prove that demand was made of the payment of the note, at the place indicated on its face. The counsel for the appellants objected to the introduction of this testimony, on the ground set out in their answer. But the court overruled their objection, and we think correctly, for the averments in the petition, taken in connexion with the note, which is made a part of it, are a sufficient allegation of a demand at the place agreed on by the parties, to let in proof of that fact.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be affirmed, with costs.

LAFERRIERE *vs.* WELLS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE SEVENTH PRESIDING.

It is a sufficient allegation, "that due and lawful demand of payment was made, without effect," with the note and protest annexed, making part of the petition, to let in proof of the demand, and failure to pay.

This is an action against the maker of a promissory note, payable at the counting house of Thomas Barrett & Co., in New-Orleans.

The plaintiff alleges, that by the note and protest annexed, and making part of the petition, "due and lawful demand of payment hath been made without effect." He prays for judgment. The defendants excepted, pleaded a general denial, and averred that the note was made payable at the counting house of Thomas Barrett & Co., and that no

demand was made there; and that it is not alleged in the petition, that said demand was made at the place designated. They pray that the plaintiff's demand be rejected.

There was judgment for the plaintiff, and the defendants appealed.

Winn and *Brent*, for the plaintiff.

Dunbar, contra.

Carleton, J., delivered the opinion of the court.

The petitioner alleges, that the note on which the suit is brought, is made payable at the counting house of Thomas Barrett & Co., at the city of New-Orleans, and "that due and lawful demand of payment was made without effect."

It is a sufficient allegation, "that due and lawful demand of payment was made without effect" with the note and protest annexed, making part of the petition, to let in proof of demand and failure to pay.

The defendants put in a similar plea to that in the case of Laferriere *vs.* Bynum et al., which this court has just decided, and took a like bill of exceptions to the introduction of testimony to prove the demand, which being overruled by the court, there was judgment against them and they appealed.

This case cannot be distinguished in principle from that above cited, wherefore, our judgment must be the same.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MASON *vs.* MASON'S WIDOW AND HEIRS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF OUACHITA.

Where an intervening party admits in his petition or answer, the material facts in the plaintiff's petition, he will not be allowed to amend and deny the facts admitted, so as to put the adverse party to the proof of them.

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Where the answers to facts and articles touching the law of another State in relation to interest, show that there is a statute law on the subject, the statute must be produced as the best evidence.

In the absence of legal proof of a foreign law concerning interest, the court will be governed by the law of Louisiana in allowing interest.

Interest is considered in lieu of fruits, and it forms a part of the *price*, for which the vendor has a privilege, as well as for the principal sum.

Where the widow receives her share of the community property, and a sum of money in lieu of dower, and the disproportion between these sums and the amount to be divided among three children, does not authorize the court to say she is in necessitous circumstances, she will not be allowed a marital portion.

A minor grandchild inheriting in right of its mother, *jure representationés*, is not bound to collate the value of a slave given to it, by the deceased grandfather before the death of its mother.

This is an action of partition. The petitioner alleges that he is one of the legal heirs of William Mason, who died in the Parish of Ouachita in 1836, but formerly resided in Alabama. That the decedent left a widow by his second marriage, a minor son and a grand-daughter, residing with her father and guardian in Georgia. That most of the property to be partaken is the separate property of his deceased father acquired in Alabama, leaving only about six thousand dollars as community effects, made since his removal to this state; and that the widow is entitled to her dower, to a tract of land situated in Alabama which has been sold for ten thousand dollars.

The plaintiff further shows that the effects of his father's succession have been sold on a credit, so that the estate consists entirely of notes and money, which can be partitioned among the heirs. He prays that a new inventory and appraisement be made of the effects, which may be taken as the basis of the partition, and that experts be appointed to make the partition in presence of a notary, etc.

The guardian of the grand-daughter joined in the action of partition, and prayed that the administrator render his account; that the property be delivered up to the heirs for

partition, etc. She comes in by right of representation of Charlotte Mason, deceased, who was the daughter of the decedent.

The widow of the deceased joins also in the suit for partition, and claims to have one-half of the community property, which amounted to six thousand eight hundred and thirty-one dollars; that she is also entitled to her dower in a tract of land in Alabama, sold by her late husband to the plaintiff for twelve thousand dollars; or to one-fourth of the proceeds of sale in full property according to the laws of Alabama. She further states that her husband died rich, leaving thirty-one thousand, seven hundred and ninety-three dollars in other property, now reduced to notes and cash. That she is in necessitous circumstances, having no other property than that herein set forth. She prays to be allowed the marital portion out of her husband's estate, according to the laws of Louisiana, in accordance with the 2359th article of the code.

She further alleges, that her husband made a donation, in making the sale of a tract of land in Alabama, to the plaintiff and a brother, Arthur Mason, now deceased, of one thousand dollars each, which should be collated; and propounds interrogatories to the plaintiff, to state these facts.

The under tutor of the minor son also joined in the suit for a partition.

The widow offered to amend her petition of intervention, in which she alleged that all the property of her late husband was community, and that she was entitled to one-half thereof. The court rejected this amendment, as inconsistent with the original petition, which went to admit the existence of the property in the manner set forth by the plaintiff. A bill of exception was taken to the opinion of the court upon all the evidence adduced by the parties. The judge of probates decreed as follows: "That the plaintiff, L. W. Mason, be quieted in his title to the land in Alabama, and that the widow receive the one-fourth part thereof in full property in lieu of dower, which she has relinquished, and that the price is eleven thousand dollars, including one thousand dollars donated to Arthur Mason; that the widow receive as her share

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of the community property, two thousand four hundred and sixty-nine dollars, and that the balance of the estate be equally divided between the three heirs; and that the grand-daughter collate two hundred and fifty dollars, the value of a slave donated to her by the decedent; and that two experts be required to partition and appraise the estate, etc."

The widow appealed from this judgment.

M'Guire for the appellant.

This is a suit for a partition of the estate of William Mason, deceased, in the parish of Ouachita, between the widow in community, her child, issue of the marriage, a minor represented by an under tutor, and E. Darecott a grand-daughter by a previous marriage.

2. The widow contends for half the estate as being all community, amounting, after paying charges in this state, to thirty-six thousand eight hundred and twenty-one dollars and seventy-five cents. It is admitted that she is entitled to one-third for life, or one-fourth in full property at her option in lieu of dower to a piece of land sold in Alabama. The court has decided for eleven thousand dollars, which is two thousand seven hundred and fifty dollars she having chosen one-fourth in full property.

3. The court erred in refusing her to amend her petition, claiming all the estate as community; that being the ground of the action, a change in the *amount* was no change in the nature of the claim. *Code of Practice*, 491–2. 7 *Louisiana Reports*, 94. 4 *Ibid.*, 297. 4 *Martin, N. S.*, 516. 5 *Ibid.*, 70. 8 *Ibid.*, 171, 434.

4. All property found in the estate at the dissolution of a marriage community, is presumed to be community, subject to proof to the contrary. *Louisiana Code*, 2374; here no proof was offered.

5. The court erred in not giving interest at eight per cent. in favor of the Estate *vs.* L. W. Mason, who bought the land in Alabama; as his answers to interrogatories proves it to be due, his obligation coming within the description of a promissory note, bearing interest by the laws of that state.

6. The court erred in refusing the *marital portion* to the widow, in accordance with Louisiana Code, 2359; after refusing her demand as community, as by the judgment she only gets five thousand two hundred and nineteen dollars and sixty-five cents, out of an estate amounting to forty-nine thousand seven hundred and fourteen dollars and two cents, which certainly shows her to be in *necessitous circumstances* relatively. 6 *Louisiana Reports*, 110. 3 *Martin, N. S.*, 1.

Garrett, contra.

Bullard, J., delivered the opinion of the court.

This is an action of partition among the co-heirs of W. Mason, deceased, and the widow who was made a party is appellant from a judgment by which she was refused her marital portion, and the full amount claimed by her in lieu of dower in certain lands in the state of Alabama, sold by her husband.

One of the appellees has prayed that the judgment may be reformed, so far as it compelled her to collate the value of a slave, of which the deceased, her grandfather, made her a donation during the life of her mother, whom she represents in the succession.

Where an intervening party admits in his petition or answer, the material facts in the plaintiff's petition, he will not be allowed to amend and deny the facts admitted, so as to put the adverse party to the proof of them.

The attention of the court is first drawn to a bill of exceptions, which shows that the court below refused to allow the appellant to amend her answer. In her original answer she had not denied the allegation in the plaintiff's petition, that most of the property was not common, but had alleged, that the community property, amounted only to about six thousand dollars, and thereupon based her claim to her marital portion. The amended answer alleged that the whole property left by the deceased, belonged to the community. It does not appear to us the judge erred, although he may not have given a legal reason for refusing the amendment. The first answer contained important admissions which the party could not fairly retract, and drive her adversary to prove a fact admitted expressly therein, to wit: that the husband's separate property amounted to thirty-one

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thousand seven hundred and ninety-three dollars and fifty-three cents.

It is next urged, that the court erred in not allowing interest on the price of the tract of land in Alabama, at eight per cent. from the time it was due, according to the law of the state, in order to ascertain the amount to which the widow was entitled, she having elected to take one fourth of the value of the land at her husband's death, in lieu of her dower. One of the heirs who had purchased the land before his father's death, was interrogated on facts and articles touching the law of Alabama, in relation to interest. He answered that there is a statutory provision in that state, as he has understood and believes, by which interest at eight per cent may be charged on promissory notes after due, without being expressed therein. But as to other debts, he believes the Supreme Court of Alabama, has decided that interest is not chargeable without being expressed. We think the evidence insufficient to show what the law of Alabama is on this subject, because the statute ought to have been produced, and we are left ignorant whether the obligation to pay the price as expressed in the contract, would be regarded by the law of Alabama as a promissory note, on which interest could be recovered at eight per cent. In the absence of such evidence of the foreign law, we must be governed by our own, and the debt being for the price of land, would bear an interest at five per cent. from the time it became due. This interest we have holden to be in lieu of fruits, and it forms a part of the price for which the vendor has a privilege, as well as for the principal sum. See *Caldwell* vs. *His Creditors.* 9 *Louisiana Reports*, 265.

Where the answers to facts and articles touching the law of another state in relation to interest, show that there is a statute law on the subject, the statute must be produced as the best evidence.

In the absence of legal proof of a foreign law concerning interest, the court will be governed by the law of Louisiana in allowing interest.

Interest is considered in lieu of fruits, and it forms a part of the *price*, for which the vendor has a privilege, as well as for the principal sum.

Instead, therefore, of one fourth of eleven thousand dollars, we think the widow was entitled to add interest at five per cent., from the time the instalments became due respectively, until her portion be paid.

The claim of the appellant for a marital portion, did not appear to the court below well founded, according to a just interpretation of article 2359 of the Louisiana Code, and according to the view heretofore taken by this court, of such

Where the widow receives her share of the community property and a sum of money in lieu of dower, and the disproportion between these sums and the amount to be divided among three children does not authorize the court to say she is in necessitous circumstances, she will not be allowed a marital portion.

A minor grand child inheriting in right of its mother, *jure representationes*, is not bound to collate the value of a slave given to it, by the deceased grandfather, before the death of its mother.

questions, we are not enabled to say it erred. See 6 *Louisiana Reports*, 110. The widow in the present case, takes her share of the property acquired in the state, together with nearly three thousand dollars, in lieu of her dower, in lands in Alabama, where the parties previously resided. The disproportion between those sums, and the amount to be divided among three children, does not appear to us such as to authorize us to say that she is in necessitous circumstances, and entitled to a further allowance.

The last question presented for our solution is, whether the minor grandchild, who inherits in the right of her deceased mother, *jure representationes*, be bound to collate the value of a slave given her by the deceased before the death of her mother. Articles 1316 and 1317 of the Louisiana Code, appear to us to leave no doubt on this point. They declare, that to make legitimate descendants liable to collation, they must appear in the quality of heirs to the succession of the ascendant, from whom they have immediately received the gift or legacy; and, consequently, grandchildren to whom a donation is made after the death of their father or mother, are liable to collate, when called to the succession of the donor jointly with the grandchildren or their uncles and aunts. But that gifts made to a grandchild by the grandfather during the life of the father, are always reputed to be exempt from collation, because while the latter is alive there is no legitimate portion due to the grandchild in the estate of the grandfather, in anticipation of which the gift may be presumed to have been made.

In these particulars, the judgment of the Court of Probates must be reformed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, so far as it restricts the claim of the widow, on account of her dower in lands in Alabama, to the sum of two thousand seven hundred and fifty dollars, without interest, and so far as it condemns the minor Darecott, to collate the value of a slave given her by the deceased in the life of her mother, be reversed; that the

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widow be allowed the aforesaid sum of two thousand seven hundred and fifty dollars, with interest, at five per cent. on one half, from the 1st of March, 1837; and on the other half from the 1st of March, 1838, until paid; that the claim for said collation be dismissed and rejected; and it is further adjudged and decreed, that in all other particulars, the judgment below be affirmed, and that the case be remanded for further proceedings according to law, the costs of appeal to be paid out of the estate.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CONCORDIA.

The acceptance of service of citation has the same effect, as if it had been served by the sheriff, and no more.

The acceptance of service of a defective or insufficient citation by the party or his attorneys, does not waive or cure any irregularities in the citation itself.

This is an action instituted in the Court of Probates, by a portion of the heirs of Aaron Brooks, deceased, against another portion of the said heirs for a settlement and partition, and to recover the portion of his succession that may be due to them.

The defendants pleaded a general denial, and aver that all the property claimed is owned exclusively by them; and that they have owned and possessed it for many years, by a just and legal title, and that said plaintiff's have no legal right or title whatever.

They further plead that the Court of Probates has no jurisdiction of the case, and possesses no power to judge of the rights between the parties, wherefore they pray that the suit be dismissed.

Upon this issue the judge of probates sustained the plea to his jurisdiction, and rendered judgment dismissing the suit.

The plaintiffs appealed.

The citation of appeal was issued and signed by William L. Poindexter, as clerk of the Probate Court. It appears there is no law authorizing the probate judge of this parish to appoint a clerk of his court.

On the back of the citation, the attorneys for the appellees endorsed, "We hereby accept service of the written *citation*, and petition of appeal annexed."—"*Vidalia, 25th August*, 1837."

Dunbar and Dunlap for the appellees, moved to dismiss the appeal, on the ground of the insufficiency of the citation.

Martin, J., delivered the opinion of the court.

In this case the citation of appeal is subscribed by a person who styles himself "clerk of the Court of Probates, for the parish of Concordia." The attorneys of the appellees endorsed on the back of this citation, "We hereby accept service of the written citation, and petition of appeal annexed. 25th August, 1837."

The dismissal of the appeal is asked on the ground that the citation is not signed by the judge of probates, there being no clerk provided by law, for the Court of Probates for that parish, and the person who signed the citation not being the judge.

The motion is resisted on a suggestion that the irregularity is cured by the acceptance of the service. It is clear that the citation is irregular, but it is not so clear that the acceptance of the service cures it. Nothing shows that the attorneys were authorized to accept service, or waive the irregularity. We have, however, considered the case in the way most favorable to the appellants, *i. e.*, as if the appellees themselves had made the acceptance of service. The condition of the appellants would then be no better than if the sheriff had returned, that he had duly served the citation and petition of appeal on the appellees.

The acceptance of service of citation has the same effect as if it had been served by the sheriff and no more.

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The acceptance of service of a defective or insufficient citation by the party or his attorneys, does not waive or cure any irregularities in the citation itself.

The latter then would certainly have the right to object, that the citation wanted the seal of the court, that they were not therein cited to appear on the return day fixed by the judge, or that it was not signed by the person who alone was authorized to sign it. The acceptance dispenses with the service of the citation, but does not cure its irregularity.

The appeal is therefore dismissed, with costs.

BROWN'S EXECUTOR *vs.* FAULK'S ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF OUACHITA.

The absence of one of the counsel, where two are employed, cannot be urged by the one present, as grounds for a continuance, because the other is the principal counsel in the case. If it were otherwise, a party could always obtain a continuance, by requesting his principal counsel to absent himself.

This is an action to recover damages from the estate of the late J. M. Faulk, deceased, for neglecting to perform his duty as attorney for absent heirs, in the matter of J. Brown's estate which was opened, and a curator appointed to administer on it in the parish of Ouachita.

The administrator of Faulk's estate pleaded a general denial, and denied specially that the executor of Brown was such at the time, and is without authority to sue.

The suit was put at issue, the 20th November, 1837. The Probate Court holds monthly terms. On the 26th May, 1838, the cause was called for trial. One of the counsel for the plaintiffs was absent, and the other objected to going into trial, on the ground that no time had been fixed for argument, and that the principal counsel was absent. The judge of probates, however, ruled him into trial on the ground that

the petition was drawn up and signed by the attorney present for himself and the other, and that he considered him principal counsel in the case, and had ample time allowed to prepare for trial. The attorney took a bill of exception to the decision of the judge. Judgment was rendered, dismissing the suit.

The counsel for the plaintiff moved for a new trial, on the ground that he had been taken by surprise, and that the cause should be reinstated.

2. The judge erred in dismissing the suit as no day had been fixed for the trial.

3. In not allowing time for the plaintiff to show cause for a continuance.

This motion was overruled and the judgment of dismissal made final.

Downs, for the plaintiff.

M'Guire, contra.

Martin, J., delivered the opinion of the court.

The defendant having filed an exception denying the plaintiff's right to sue as executor, one of the counsel of the latter objected to going into the trial on the day it was called up for argument, on the ground that it was not regularly set down for hearing on that day. The objection being overruled, he moved for a continuance, on the ground that the other counsel was the principal one in the cause, and was absent. The continuance was refused, the case was heard, the exception sustained, and judgment given dismissing the suit. The plaintiff appealed after an unsuccessful attempt to obtain a new trial.

Nothing enables us to say, whether according to the rules of proceeding of the Court of Probates of the parish of Ouachita, it was necessary that the exception should be set down for argument, previous to its being taken up for trial. In the absence of any information on this subject, we are to presume that the court acted correctly.

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The absence of one of the counsel, where two are employed, cannot be urged by the one present as grounds for a continuance, because the other is the principal counsel in the case. If it were otherwise a party could always obtain a continuance by requesting his principal counsel to absent himself.

It appears to us the court did not err. Even if the grounds for a continuance had been verified by affidavit, they would not have sufficed; for otherwise a party could always obtain a continuance by requesting his principal counsel to absent himself.

The motion for a new trial was properly disregarded, as the grounds of it were a mere repetition of those on which the trial of the exception had been opposed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be affirmed with costs.

BROWN *vs.* TRENT.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE THEREOF PRESIDING.

If a defendant only left the state temporarily, he does not thereby lose his domicil; and if permanently, the house in which he last resided is the one where service of citation, and other process, may be made.

In the silence of the code, as to the manner of serving notice of judgment, it is the most reasonable to adopt the practice which would be required in the service of original process.

Notice of judgment must be served in the same manner as in serving petitions and citations in the first instance.

This is an action on a bail bond. The defendant became the surety or bail for one F. Foy, for the payment of the sum of three hundred and forty-one dollars, and the costs of suit, or such judgment as might be rendered. At the May term, 1836, of the Parish Court for the parish of Ouachita, judgment was rendered against Foy, for two hundred and seventy dollars and fifty cents, and notice thereof was served on Foy,

by leaving it with a free white person above the age of fourteen, say Robert Klady, at his usual place of domicil, about twenty-eight miles from the court house in Monroe.

Upon this judgment, both a *fi. fa.* and *ca. sa.* issued, and were returned, "no property, and the defendant not found."

The plaintiff then gave the usual notice, and moved for judgment against the present defendant on his bail bond. The parish judge gave judgment against the bail or surety, but with a stay of execution until the appeal from the original judgment of Brown against Foy, then pending, should be decided, and said judgment become definitive.

From this judgment the plaintiff appealed to the District Court.

The defendant denied that he was liable, or could be made so, until the original judgment of the Parish Court, which is now pending on appeal, be made definitive against Foy, the principal debtor. 2. That service of notice of said judgment on Foy was defective, and not made in pursuance of law, and consequently, both executions issued wrongfully. 3. The condition of the bond was satisfied by the appearance of Foy in the Parish Court, at the term when said judgment was rendered.

Upon the trial, the evidence showed, and it was admitted, that when the notice of judgment was served, Foy had left Louisiana for Texas, with his family, the spring preceding, and has not resided in the state since; that the plaintiff, by his affidavit, holding Foy to bail, showed his knowledge of his intention to leave the state, and it was admitted an appeal not suspensive had been taken, and was pending in the original suit.

The district judge reversed the judgment of the Parish Court, and gave judgment for the defendant. The plaintiff appealed.

M'Guire, for the plaintiff, insisted that the judgment should be reversed, and one for the plaintiff rendered. The judgment of the Parish Court is correct, if divested of its conditional character. It should have been absolute.

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2. The district judge erred in requiring proof of the service of notice of judgment on Foy, before proceeding against his bail. This matter is not put at issue by the pleadings.

3. The party has made no legal defence against his bond, and has no good ground for contesting its payment. See case of Gale *vs.* Quick's bail, 2 *Louisiana Reports*, 348.

Garrett, for defendant, opposed a recovery because no legal service of notice of judgment was made on Foy before proceeding to issue execution. Notice was left with a person at his former residence, or usual domicil, when the evidence showed that Foy had long before removed to Texas.

2. Legal service can only be made personally, or at the domicil. The article 429 of the Code of Practice points out another mode of serving notices on a party who has no advocate on record, and who does not reside in the place where the court is held. The service is made by delivering the notice to the clerk, to be by him stuck up in his office. None of these modes were pursued. *Code of Practice*, 187–8–9, 429 ; 2 *Louisiana Reports*, 171 ; 4 *ibid.* 258–9.

Bullard, J., delivered the opinion of the court.

The principal question presented in this case is, whether the notice of judgment was regularly served upon Foy, for whom the defendant was bail ; for if it was, then the *fieri facias* did not issue improvidently, and on a return of *nulla bona*, the judgment creditor was entitled to his *ca. sa.*

It appears that Foy had his domicil in the parish, at the time the suit was brought, but that he went away less than a year before judgment was rendered, and that the notice of judgment was served on F. Foy, by leaving it with a free white person above the age of fourteen, (say Robert Klady,) at his usual place of domicil, about twenty-eight miles from the court house in Monroe. It appears to us this would be a sufficient return of service upon a citation. But the code does not appear to have provided for the manner in which notices of judgment shall be served.

It is contended by the appellee, that the notification of

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judgment must be made in the manner pointed out by article 429 of the Code of Practice, whenever the adverse party does not reside at the place where the court is held, before which the cause is pending, and who has no advocate of record, to wit: by handing to the clerk of the court, a copy to be by him stuck up in his office. This mode of giving notice applies more particularly to interrogatories, to be propounded to witnesses whose depositions are to be taken, but is to govern in all cases where written notice is required, pending the cause when the party to be notified has no advocate of record, and does not reside at the place where the court is held.

If a defendant has only left the state temporarily, he does not thereby lose his domicil; and if permanently, the house in which he last resided is the one where service of citation and other process may be made.

Foy was sued as a citizen of the parish of Ouachita, where he had his domicil. At the time notice of judgment was served, he had removed either temporarily or permanently from the state. If the absence was temporary, he certainly has not lost his domicil, and if permanently, the house in which he last lived, is the one where service may be made. 6 *Martin, N. S.*, 467.

In the silence of the code as to the manner of serving notice of judgment, it is the most reasonable to adopt the practice, which would be required in the service of original process.

In the silence of the code, as to the manner of service of notice of judgment, we think it most reasonable to adopt that which would be required in the service of original process. We understand the uniform practice in the courts of the first instance, has been to give notice in that manner, and we see no good reason in this case for unsettling that practice. We conclude that the court erred in giving judgment of non-suit, but the record does not enable us to pronounce finally upon the case.

Notice of judgment must be served in the same manner as in serving petitions and citations in the first instance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, the non-suit set aside, and that the case be remanded for further proceedings, according to law.

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GEORGE
vs.
FITZGERALD.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE DISTRICT PRESIDING.

Curators *ad hoc* may be appointed in particular cases, for the benefit of persons having suits to institute against absentees, who cannot otherwise arrest or attach the property of such absentees, or make service of citation either personally or at their domicil.

In the case of Guillet *vs.* Erwin, (7 *Louisiana Reports*, 580) if it had been urged, that prescription would have been interrupted, by the appointment of a curator *ad hoc* to the defendant, the plea of prescription might probably have been supported.

So, where a defendant resides in another state, and never had any agent, or domicil here, and has no property or interest in this state, he may, nevertheless, *be sued here*, in a personal or redhibitory action, by the appointment of a curator *ad hoc* to defend him.

This is a redhibitory action. The plaintiff alleges, that in April 1835, at New Orleans, he purchased from one William H. Fitzgerald, of Pittsylvania county, Virginia, a number of slaves, amongst them Daniel, for eight hundred and fifty dollars, Winney for six hundred and fifty dollars, and Billy for eight hundred and seventy-five dollars, making in all two thousand three hundred and seventy-five dollars, which said slaves were warranted and guaranteed against all redhibitory vices and defects by the defendant. That Daniel was afflicted with diarrhœa or an incurable disease, of which he died; Winney had the same disease of which she died; and that Bill was afflicted with a scrofulous and other incurable diseases, which has occasioned him to linger and become wholly useless; and that he would not have purchased said slaves, had he known or been informed of their diseases, all of which the defendant knew and concealed from him.

He further shows that he has suffered damage in consequence of said fraud, amounting to fifteen hundred dollars, and sustained a loss of fifteen hundred dollars, in the cost of maintaining and supporting said slaves, and furnishing them medical aid, which, added to their price, amounts to five thousand three hundred and seventy-five dollars. That the said

Fitzgerald lives out of the state, and absented himself immediately after the said sale, and has no known agent or attorney in fact within this state, upon whom demand could be made or process served. He prays that a curator *ad hoc* be appointed to represent the defendant, and that he have judgment rescinding the sale of said slaves, and for the return of their price and the damage he has sustained.

The curator *ad hoc* appointed to defend, put in an exception denying the jurisdiction of the court in such a case as this, and praying that the suit be dismissed.

Upon this exception to the jurisdiction, the cause was dismissed.

The plaintiff appealed.

Dunbar, for the plaintiff, relied on the Louisiana Code, article 57, Code of Practice, article 116, and the case of Zacharie *vs.* Blandin, 4 Louisiana Reports 154, in support of this case.

Hyams, contra, insisted that the court had no jurisdiction of a person residing in another state, who never resided or had a domicil or agent here, and who was without any interest or property in the state, and has never been here at or since the inception of this suit.—3 *Martin, N. S.* 321.

2. The article 57, of the Louisiana Code, gives no jurisdiction in a case like this; it must be taken in connexion with all the other articles preceding and succeeding it, and they all point to property or a domicil left by the absentee. Article 414 explains article 57.

3. This court has decided that defendants (absentees like Fitzgerald) could not plead prescription, because by their absence the plaintiff could not bring suit. *Contra non Valentem agere non currit prescriptio.* Now if, as is pretended here, the plaintiff could have brought suit by the appointment of a curator *ad hoc*, then the court should have decided the plea of prescription to be good. See cases of *Morgan* vs. *Robinson*, 12 *Martin*, 76. *Guillet* vs. *Erwin*, 7 *Louisiana Reports*, 580.

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Martin, J., delivered the opinion of the court.

This is a redhibitory action against the defendant, who resides in the state of Virginia, upon a sale made by him of several slaves, to the plaintiff, in this state. A curator *ad hoc* was appointed to the defendant, under the fifty-seventh article of the Louisiana Code, which provides for such an appointment, when the defendant resides out of the state, and has no agent or attorney therein; and also in pursuance of the 116th article of the Code of Practice, which contains a similar provision.

The curator *ad hoc* filed a plea to the jurisdiction of the court, which was sustained; the suit dismissed, and the plaintiff appealed.

It has been contended on the part of the appellee, that a curator *ad hoc* was improperly appointed, because the defendant had neither property or an agent in the state. That the article 57, of the Louisiana Code, must be taken in connexion with those which precede and succeed it, and they all relate to property left by an absentee. He also relied on article 414, to explain this article. He further contended that the suit against a person who resides out of the state and has no property in it, would seldom be available, as it would not be respected out of the state, and appeared unnecessary in this, for the purpose of interrupting prescription. He cites the cases of Morgan *vs.* Robinson, 12 *Martin*, 76, and Guillet *vs.* Erwin, 7 *Louisiana Reports*, 580.

Curators *ad hoc* may be appointed in particular cases, for the benefit of persons having suits to institute against absentees who cannot otherwise arrest or attach the property of such absentees or make service of citation either personally or at their domicil.

The District Court, in our opinion, erred. The first chapter of the Louisiana Code, which treats of the curatorship of *absentees*, provides curators for the benefit of those persons, in order that their estates might be administered and their interests protected. The article fifty-seven of that chapter, afterwards provides curators to them, in particular cases, for the benefit of those persons who may have suits to institute against absentees, and are unable to commence them, because the absentee cannot be arrested, nor his property attached, or citation served, either personally or left at his domicil. The case of Morgan *vs.* Robinson, in which the court held that the plea of prescription could not avail

the defendant, because by withdrawing from the state, without leaving property in it, he had prevented the plaintiff from instituting his suit, was determined before the promulgation of either the Louisiana Code, or Code of Practice. At that time the appointment of a curator *ad hoc* to an absentee was not authorized by law. The plaintiff had been guilty of no laches, and instituted his suit as soon as he could after the return of the defendant to the state. In the case of Guillet *vs.* Erwin, it was not urged that the plaintiff might have interrupted the prescription by a suit, and the appointment of a curator *ad hoc*, under the 57th article of the code. The court did not notice this circumstance, which probably would have induced it to support the plea. But, admitting the appointment of a curator *ad hoc*, and service of citation on him, are not needed for the interruption of prescription, they may be of great utility to a party, who, by delaying his suit, may be in danger of losing the evidence which enables him to support it, by the death of the party or his witnesses.

In the case of Guillet *vs.* Erwin, (7 Louisiana Reports, 580,) if it had been urged that prescription would have been interrupted by the appointment of a curator *ad hoc* to the defendant, the plea of prescription might probably have been supported.

Many arguments have been used to show the inutility of proceedings against an absentee in this manner, and the danger which may result from it. They no doubt were offered and considered by the legislature, and did not prevent the adoption of the provision contained in the article under consideration, and cannot authorize the court to disregard it.

In the case of Zacharie *vs.* Blandin, 4 *Louisiana Reports*, 154, we held that a curator *ad hoc* was properly appointed to represent the defendant, who resided in Tampico, and who had no agent within the state, and to whose estate no curator had been appointed. The article 57, already cited, authorizes the appointment of a curator *ad hoc*, perhaps, even in the case of an absentee who has property in the state, and gives to the creditor the double remedy of a suit by attachment, or by service of citation on a curator *ad hoc*.

So, where a defendant resides in another state, and never had any agent or domicil here, and has no property or interest in this state, he may nevertheless *be sued here*, in a personal or redhibitory action by the appointment of a curator *ad hoc* to defend him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed, the plea to the jurisdiction overruled, and the cause remanded for further proceedings, according to law; the defendant and appellee paying the costs of the appeal.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF OUACHITA.

The administrator is responsible for any sum falling to the estate of the deceased, by inheritance, after his death, and which comes into the hands of the administrator, even after the inventory is taken; and he is also entitled to his commissions on the same.

But where the administrator surrenders a claim in favor of the deceased, on his father's estate, to his widow, and omits to place it in his account of administration, he will not be allowed to present a second account including this item, with his full commission charged thereon.

Where the court is unable from the evidence, to strike a final balance, in the settlement of an administrator's account, the case will be remanded for a new trial.

The plaintiffs, who are the widow and her second husband, as co-tutor of the minor child, and sole heir of the deceased, John S. Scriber, made opposition on various grounds, to the administrator's account.

The defendant filed his final tableau and account of the administration of the decedent's estate, and prayed that it be homologated, his bond cancelled and he discharged. In making up his account he debited himself with the amount of the inventory three thousand five hundred and thirty-three dollars, and also with the sum of ten thousand seven hundred and ninety-five dollars, as the portion coming to the decedent from his deceased father who had died before him, and which is put down as coming into the hands of the administrator, on a partition among the heirs. These items were also accounted for and credited to the estate, but full commissions of two and a half per cent. were charged thereon. The account showed a balance due the administrator of ten hundred and fifty dollars, for which he prayed judgment.

The plaintiffs oppose the allowance of commissions on these two items; first, because the estate is not fully administered, and commissions can only be allowed on such sums as were actually collected or received, and paid over; and second, because the portion inherited by J. S. Scriber, de-

ceased, from his father, never came into the defendant's hands, as administrator of J. S. Scriber, but that he received it on a partition, and it was collected from him on an execution, and never made a part of the inventory of the estate he administers.

The plaintiffs then allege, that the estate is not yet fully administered, and another administrator will have to be appointed. They annex a statement of an account of the estate, and after allowing commissions on the amount actually administered, they claim a balance from the administrator of five hundred and forty-seven dollars and ninety-nine cents, for which they pray judgment.

The evidence showed, that commission was charged by the administrator, on the sum of fourteen thousand eighty-two dollars and seventy-two cents, when only seven hundred and fifty-four dollars and forty-five cents of this sum, was actually administered by him.

There was a claim of ten thousand seven hundred and ninety-five dollars, included in this sum, which the deceased had on his father's estate, but which was never received by the administrator, although it was mentioned in the inventory. It was surrendered by the administrator to the widow and heirs of the deceased.

This item was not included in the first account rendered by the administrator, but was put in a second. It was strenuously opposed. After hearing the evidence and explanations of counsel, the judge of probates allowed the account, homologated it, and gave judgment for the balance claimed by the administrator. The plaintiffs, in opposition, appealed.

Downs and *Hyams*, for the plaintiffs, in opposition.

Commissions are erroneously allowed on the sum of ten thousand seven hundred and ninety-five dollars, which never came into the administrator's hands. It was a mere expectancy of the deceased on his father's estate, and was surrendered up a few months afterwards to the widow and heirs. The administrator cannot charge commission on effects

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returned, although put in the inventory. *Louisiana Code*, 1182, 1187, 1062, 1677. 9 *Louisiana Reports*, 306.

M'Guire, contra.

Bullard, J., delivered the opinion of the court.

The appellee, as administrator of the estate of J. S. Scriber, presented his account to the Court of Probates, and its homologation was opposed on several grounds by the appellants, who have appealed from a judgment by which their opposition was disregarded.

The administrator is responsible for any sum falling to the estate of the deceased by inheritance after his death and which comes into the hands of the administrator, even after the inventory is taken, and he is also entitled to his commission on the same.

The first item objected to in the account opposed, is the commission charged by the administrator on a sum of ten thousand seven hundred and ninety-five dollars and two cents, which, it is contended, never came into his hands as administrator, but that it was received from the estate of their father.

It appears from the inventory of the estate administered by the appellee, that a claim of the deceased, to a portion of his father's estate, is mentioned, but the amount was not at that time ascertained. If the amount charged, passed through his hands afterwards, and he was legally responsible for it, and had a right to receive it as administrator, he had, in our opinion, a right to be paid commissions upon the amount.

But where the administrator surrenders a claim in favor of the deceased on *his* father's estate, to his widow, and omits to place it in his account of administration, he will not be allowed to present a second account including this item, with his full commission charged thereon.

The record shows, that after the appointment of the appellee as administrator of J. S. Scriber's estate, he surrendered to the widow, the present appellant, most of the property mentioned in the inventory, and among the rest the unsettled claim of the deceased upon his father's succession. He afterwards presented his account to the Court of Probates, which he prayed might be approved and homologated, and in which no mention is made of the item of ten thousand seven hundred and ninety-five dollars, and no commission is charged on that amount. The presenting of the present account appears to have been, as relates to that item, an after thought. Whether under these circumstances the administrator be now authorized to charge these commissions, was a

Where the court is unable from the evidence, to strike a final balance in the settlement of an administrator's account, the case will be remanded for a new trial.

question presented to the court below, and decided in favor of the administrator.

We are unable to concur in this conclusion of the Court of Probates. We are of opinion, that this item of the account, ought to have been rejected, and the opposition sustained.

The evidence in the record, does not enable us to strike a final balance, and in our opinion, justice requires that the case should be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be annulled, avoided, and reversed; and it is further ordered, that the case be remanded for a new trial, and that the appellee pay the costs of appeal.

ZAIRE *vs.* BODIN.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF OUACHITA.

An appeal will not lie from a judgment or order of the Probate Court, ordering an inventory to be made and appointing an attorney of absent heirs, even when it is urged the will dispenses with this and that the property is all devised to the instituted heirs.

This case comes up on an opposition to the application of A. Bodin, Esq., to be appointed dative testamentary executor to the estate of Michel G. Pomier, deceased. He alleges he is the attorney of the absent heirs of François Gallez, who was one of the instituted heirs, and named by the executor in the will.

The plaintiff in the opposition, Emelie Zaire, alleges she is the only surviving instituted heir of the deceased, and has the exclusive right to be appointed executrix under the will; that she is in possession of the property of the succession as

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heir, and that the applicant has no claim whatever to be appointed to the executorship. She prays that his application be rejected.

The judge of probates decided that it was admitted the deceased left a will, which was proved but never made executory. The opposition was sustained, and the application of A. Bodin dismissed. It was further ordered that the will be probated and executed; and that an inventory be made of the succession; and I. Garrett, Esq., attorney at law, be appointed attorney of the absent heirs.

From this judgment, the plaintiff in opposition appealed.

M'Guire, for the appellant.

Garrett, contra, moved to dismiss the appeal on several grounds, but mainly that it was not an appealable case.

Martin, J., delivered the opinion of the court.

This is an appeal taken from an order that an inventory of the estate of the appellant's testator, and an appointment of an attorney to represent the absent heirs be made.

The dismissal of the appeal is prayed for, on the ground that it is not from a final judgment, nor from an interlocutory order, which causes an irreparable injury.

An appeal will not lie from a judgment or order of the Probate Court, ordering an inventory to be made and appointing an attorney of absent heirs, even when it is urged the will dispenses with matter, and the property all devised to the instituted heirs.

The appellant is testamentary executrix to the deceased, and it is difficult to imagine how she can be irreparably injured by an inventory of the estate being made. She contends that it does, because the will dispenses her from making one, and all the property is devised to her and another person named in the will; so, also, there was no necessity for appointing an attorney to represent the absent heirs.

She urges that the order requiring an inventory to be made, and the appointment of an attorney to the absent heirs will subject her to useless costs.

If the interlocutory order was improperly made, it will occasion no irreparable injury, because when the cause is finally disposed of, the costs attending it will be recovered from the party who provoked it.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

BROWN'S EXECUTOR *vs.* WILLIAMS ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF OUACHITA.

If a question of fact is raised in the Supreme Court, which is necessary to the decision of the case, the proceedings will be suspended, until it be tried in the court which granted the appeal.

If the right or interest necessary to entitle a party to an appeal be contested, and depends on a fact to be inquired into, the appeal will be suspended for that purpose.

This is an appeal from the judgment of the Court of Probates, homologating and confirming a judicial sale.

The proceedings show, that John Williams, one of the defendants, had been appointed curator of what was supposed to be the vacant estate of the Hon. James Brown, deceased, and obtained an order for the sale of the property of his estate in the parish of Ouachita, and that, at the probate sale thereof, in July, 1836, Isaiah Garrett, Esqr., became the purchaser of two tracts of land. During the same month, Garrett took out a monition, and after the usual advertisements, on the 23d of October following, the said sales were homologated and confirmed, by a definitive judgment of the Probate Court, in accordance with the act relating to monitions, passed March 10th, 1836.

On the 23d August, 1837, Isaac T. Preston, testamentary executor of Brown, residing in New-Orleans, sent up to the parish of Ouachita, an authentic copy of his letters testamentary, dated July 11, 1835, and presented his petition of appeal from said judgment.

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The petitioner alleges, that Williams obtained the curatorship of said estate, under the false and fraudulent allegation that it was vacant, and not represented, when in truth and in fact, the succession of said James Brown was opened in the parish and city of New-Orleans, and letters testamentary granted to the petitioner, which are annexed. That said succession is materially injured and prejudiced by the proceedings had under the said curatorship. He, therefore, prays an appeal, and that J. Williams, and Isaiah Garrett be cited in the appeal.

Downs and *Copley*, for the appellant, supported the pretensions of the executor of Brown to appeal, and thereby arrest the proceedings by which the property of the estate was illegally ordered to be sold. The sales are a nullity, and cannot be cured by a monition ; it only relates to the form of sales, etc.

M'Guire, for the appellees, moved to dismiss the appeal, because the letters testamentary, by which Preston claims to be executor, are dated the 11th July, 1835, and their authority cannot extend beyond a year, which would expire the 11th July, 1836, without a re-appointment by the Court of Probates. *Louisiana Code*, 1666–7, 1652.

Martin, J., delivered the opinion of the court.

Garrett, having purchased property sold by an order of the Court of Probates, on the application of one Williams, who had procured letters of curatorship on the estate of James Brown, deceased, obtained the homologation of the sale, after publication of a monition, according to the act of the legislature, approved March 10th, 1834. Preston, suggesting that Brown's succession had been opened in the parish of New-Orleans, where he had qualified as testamentary executor, long before Williams was appointed curator, is appellant from the judgment of homologation.

If a question of fact is raised in the Supreme Court, which is necessary to the decision of the case, the proceedings will be suspended, until it be tried in the court which granted the appeal.

The appellees deny that Preston is executor of Brown's estate, because the year of the executorship, which began on

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If the right or interest necessary to entitle a party to an appeal be contested, and depends on a fact to be inquired into, the appeal will be suspended for that purpose.

the 11th July, 1835, expired the same day in the following year, and he has not shown a prolongation. The judgment appealed from was rendered the 23d October, 1836.

This being a question of fact, raised in this court, on which we are not authorized to receive evidence, nor to act in the first instance, the proceedings before us must be suspended, until it be tried in the court which granted the appeal. Taylor et al. *vs.* Jeffries's estate, 10 *Louisiana Reports*, 435, 438.

It is, therefore, ordered, adjudged, and decreed, that the case be remanded to the Court of Probates, with direction to the judge, to inquire into the claim of the appellant to the right of appeal.

MOSS *vs.* BYRNES.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

Where a mortgage is taken to secure the payment of a note, a demand of payment *must be alleged, and proved* to have been made, at the place designated, before an order of seizure and sale can be supported to enforce payment.

This suit commenced by order of seizure and sale, granted on the following promissory note, secured by mortgage:

"$4089. Concordia, 1st July, 1837.

On or before the 15th day of March next, I promise to pay to Chester D. Moss, or order, four thousand and eighty-nine dollars, for value received, payable and negotiable at the Union Bank of Louisiana, New-Orleans.

W. BYRNES."

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A mortgage was executed by notarial act, with which this mortgage was identified and paraphed, "*ne varietur*," in which said Byrnes declared he was indebted to Chester D. Moss in the sum stated, for which he had executed *his note of even date*, "payable and negotiable at the Union Bank of Louisiana," etc.

The plaintiff alleged, that at the maturity of said note, *payment was duly and amicably demanded* of said Byrnes, who refused to make said payment, etc.

There was no protest of the note, or any evidence that it was ever presented at the Union Bank of Louisiana for payment, where it was made payable. A suspensive appeal was prayed and granted from said order.

Dunlap and *Stacy*, for the appellant, assigned for error that there was no allegation in the petition, or proof offered of a demand of payment; or that the note was ever presented and payment demanded at the place where it was made payable; for these errors the order of seizure and sale should be annulled and set aside, and the proceedings dismissed.

Martin, J., delivered the opinion of the court.

The defendant is appellant from an order of seizure and sale, granted on an authentic act of mortgage, by which he acknowledged himself indebted to the plaintiff in a sum for which he had executed his note, payable at a particular place, and to secure the payment of said note, he mortgaged, etc. He assigns as error apparent on the face of the record, that the plaintiff's petition did not allege a demand of payment at the place named in the note, and that there is no proof of such a demand.

Where a mortgage is taken to secure the payment of a note, a demand of payment *must be alleged and proved*, to have been made at the place designated, before an order of seizure and sale can be supported to enforce payment.

This case has been submitted to us without any argument. The authentic act acknowledging a debt, might have been the ground of a personal action, because the giving a note does not discharge a pre-existing debt. We do not mean to say that a recovery could be had, without producing or accounting for the note, which might have been negotiated at the time of the suit, or could be so even after judgment.

In the present case, however, the act expressly sets forth, that the mortgage is given to secure *the payment of the note*, on which no personal or hypothecary action can be supported, until payment be first demanded at the place therein named. Such a demand is neither alleged or proved in this case.

It is, therefore, ordered, adjudged and decreed, that the order of seizure and sale be set aside, and that the plaintiff and appellee pay all costs.

REYNOLDS' TUTOR *vs.* REYNOLDS' ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF RAPIDES.

After judgment by default, which is equivalent to issue joined, it is too late to take an exception to the capacity of the plaintiff to sue.

So, where the defendant acknowledged service of the plaintiff's petition, and filed an answer to the merits, and rendered his account as administrator, it is a waiver of service of citation, and he cannot afterwards except for want of such service, and of proof of the plaintiff's capacity to sue.

This is an action, in which the plaintiff alleges he is the natural tutor of his minor child, and calling on the defendant, who is the administrator of his deceased wife, to render an account of his administration, to deliver over certain notes, and a slave; and pay up any balance of moneys, both principal and interest remaining in his hands belonging to said minor.

The probate judge, on this petition, ordered the defendant to render his account in court.

The defendant accounted, and put in an answer to the merits.

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Upon these pleadings judgment was rendered, ordering the defendant to deliver up the slave and the notes specified, from which judgment he appealed, after an unsuccessful attempt to obtain a new trial.

Hyams, for the plaintiff.

Winn, contra.

Carleton, J., delivered the opinion of the court.

The plaintiff, who is the natural tutor of his minor child, has instituted this action to compel the defendant to render an account of his administration, of the succession of the mother of the said minor, and to deliver up a slave with certain promissory notes, which it is alleged he illegally withholds.

Service of the petition was acknowledged on the 25th June, 1836, and on the 12th of December thereafter, the judge gave an order, requiring the administrator to render his account on the 1st of January, 1837.

There was a judgment by default, and another order to account in March, 1837; and in April, 1837, a judgment requiring the defendant to deliver up the slave and notes mentioned in the petition.

The defendant then filed his answer and account, and on the 6th of June, 1837, the court rendered another judgment, homologating his account, and the defendant appealed.

After judgment by default, which is equivalent to issue joined, it is too late to take an exception to the capacity of the plaintiff to sue.

So, where the defendant acknowledged service of the plaintiff's petition, and filed an answer to the merits, and rendered his account as administrator,

It appears that after the rendition of the judgment by default, the defendant moved for a new trial, principally on two grounds, which are now again insisted upon before this court, as cause for the reversal of the judgment below.

1st. There is no evidence that John A. Reynolds is tutor of the minor.

2nd. That there was no citation served upon the defendant.

We think both of these objections altogether untenable.

A judgment by default is equivalent to issue joined, after which it is too late to take exception to the capacity of the plaintiff to sue, and the defendant having acknowledged

service of the petition, is surely a waiver of service of citation, or it can have no meaning at all; moreover, the defendant filed his answer to the merits, and rendered his accounts without insisting on either of the exceptions here taken.

We do not perceive any error in the judgment of the court below, and think it ought to be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

it is a waiver of service of citation, and he cannot afterwards except for want of such service, and want of proof of the plaintiffs capacity to sue.

BULLOCK *vs.* NALLY ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT FOR THE PARISH OF RAPIDES, THE JUDGE OF THE DISTRICT PRESIDING.

The plaintiff may strike out special endorsements on a note in suit, at the time of the trial.

It is no objection that a note is made a part of the petition, to the right of the plaintiff to strike out special endorsements at the trial; for it is made part, only with a view to verify what is written, and does not require proof of the signature which may be stricken out.

This is an action against the endorsers of a promissory note.

At the trial the plaintiff obtained leave of the court to strike out some special endorsements, following the signatures of the defendants. It was objected to by the defendant's counsel, and permitted by the court.

There was judgment for the plaintiff, and the defendants appealed.

Winn, for the plaintiff.

Dunbar, contra.

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Carleton, J., delivered the opinion of the court.

The petitioner alleges, that he is the holder of a promissory note, drawn by William Bailey, payable to the order of Otho W. Nally, who endorsed it to Thomas & Dawson, by whom it was endorsed to the petitioner. The note is annexed and made part of the petition.

The defendants plead the general issue; there was judgment for the plaintiff, and the defendant appealed.

At the trial of the cause, plaintiff's counsel asked leave of the court to strike out the special endorsements, written at the foot of the defendants' names, to which defendants' counsel objected; but the court overruled the objection, and it was struck out accordingly.

The plaintiff may strike out special endorsements on a note in suit, at the time of the trial.

Defendant's counsel now insists, that the court erred, inasmuch as the plaintiff having declared that the note made a part of his petition, it was equivalent to setting out the special endorsement in the petition itself; wherefore, it became necessary to prove the signatures affixed to it, and cited 2d Starkie on evidence, pages 248, 249, 246, 244.

It is no objection that a note is made *a part* of the petition, to the right of the plaintiff to strike out special endorsements at the trial, for it is made part, only with a view to verify what is written, and does not require proof of the signatures which may be stricken out.

We think the court did not err, for the note was made part of the petition, only with the view to verify what is therein stated, to wit, that it was endorsed by Otho W. Nally, and Thomas & Dawson, and for no other purpose.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

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ACTION.

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1. In a possessory action, solely as such, patents or title papers are inadmissible as evidence; but in a mixed action for the recovery of possession and vindictive damages for a forcible dispossession, they may be read to the jury to explain the motive with which the party acted, and in mitigation of damages. .....*Bailey*, &c. vs. *Hickman*, 415

2. Where B and W sue in a mixed action, to recover possession and damages for a forcible dispossession, and they allege themselves to be in possession as joint owners, join in the claim for damages, and these allegations are put in issue by the answer, the court cannot instruct the jury, that if the evidence showed that B had such possession as would entitle him to a verdict in a possessory action, and there was no evidence in favor of W, they might *find for B and against W*. This does not accord with the allegation..... *ib.*

3. The supplemental petition of the heirs of a deceased plaintiff, is in the nature of the revival of the action, rather than an amendment, and service of the new petition and citation must be made on the defendant.

Babcock, &c. vs. *Williams*, 428

4. Where one of the plaintiffs in a joint action, died after issue joined, the suit did not abate; and an order to revive it in the name of the heirs, &c. of the deceased plaintiff, being made contradictorily with the defendant: *Held*, that no service of the amended petition and a citation or notice to the adverse party was necessary, or even judgment by default..... *ib.*

5. So, where a co-plaintiff died, after issue joined, an order reviving the action in the name of his heirs, &c., made contradictorily with the defendants, was held to be sufficient notice to the latter, to proceed to final judgment..... .....*Babcock*, &c. vs. *Wells et al.*, 431

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6. In an action on a *quantum meruit*, the defendant may show that there was a verbal or written contract between the parties; and if a contract really existed, the plaintiff cannot recover in this action.
Hogan vs. *Gibson*, 457

7. So, on a *quantum meruit* the plaintiff cannot recover for extra work alleged to have been done..... *ib.*

8. Where the plaintiff in the action dies after issue joined, and an order of revival was made in the name of his widow, (who was administratrix,) and legal representative, which order was duly served by the sheriff: *Held*, that there was no need of a citation to issue, as the representatives had full notice of the pendency of the suit.....*Bailey* vs. *Smith*, 506

9. If the plaintiff dies after issue joined, a citation is unnecessary, as that would be the commencement of a new action, which does not abate in a case like this. No judgment by default is required, because issue was already joined..... *ib.*

10. It is irregular to cumulate a petitory action with the proceedings on a monition to homologate a sale, in the shape of a reconventional demand. If the objection is made, the court will reject such a proceeding and demand.
Pannell's Heirs vs. *Overton*, 555

11. If the opponents of a monition set up title in the nature of a petitory action, and the other party chooses to join issue on the merits, the court will proceed to try the case on the titles, as in a petitory action..... *ib.*

APPEAL.

1. Where from the circumstances of the case, it was presumed the appellant honestly imagined the judgment appealed from, was erroneous, he was not mulct in damages,.....*Henderson* vs. *Bryan*, 10

2. But when it is manifest, the appeal was taken merely for delay, judgment will be affirmed with costs, and ten per cent. damages.
Cochran vs. *Perry*, 11

3. The irregularity of *testing* the citation of appeal, by the District instead of the Probate Court, from whose decree the appeal is taken, is immaterial, and the appeal will be sustained.
Maddox vs. *Maddox's Executor*, 13

4. If the record is not made up in such form, as to enable the court to examine and revise the judgment below, the appeal will be dismissed.
Le Blanc et al. vs. *Viel et al.*, 33

5. So, where the certificate of the clerk, states only that the record contains "a true copy of all the papers found in the case, &c.," and there is no bill of exceptions, statement of facts, or assignment of errors, the appeal will be dismissed.....*Fredericks* vs. *Kellar*, 47

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6. An appeal lies against a judgment sustaining a plea to the jurisdiction of the court; and also, when it contains an order remanding the cause to another court.....*State* vs. *Judge Morgan*, 118

7. An appeal lies from an order of court, refusing to allow the defendant to bond property which has been sequestered; and also from the refusal to set aside an order of sequestration..... *Taylor* vs. *Penrose et al.*, 137

8. An appeal lies from an order of refusal, to set aside a sequestration, which is only an interlocutory judgment, not requiring the signature of the judge.....*Van Winckle* vs. *Flecheaux*, 148

9. Where the plaintiff claims three hundred dollars, *with interest*, and there is some interest due at the filing of the answer, it is sufficient to give the Supreme Court jurisdiction on appeal.....*Olden* vs. *Alexander*, 156

10. The certificates of the clerk and judge, that the record contains all the evidence adduced on the trial, will be disregarded and the *appeal dismissed*, if the cause is not in a situation to enable the court to examine the testimony and the whole case on its merits.....*Phelps* vs. *Morgan*, 181

11. All the appellees must be cited, or the appeal will be dismissed. *Percy et al.* vs. *Millaudon*, 271

12. When the appellee cannot be found after diligent search, service of the appeal should be made on his attorney..... *ib.*

13. Service of citation, and petition of appeal on the appellee, made at the domicil of another, is not good..... ..... *ib.*

14. No appeal lies from an interlocutory judgment, discharging a rule requiring the defendants to show cause why their *amended* answer should not be stricken from the record.....*Bedford* vs. *Urquhart et al.*, 295

15. The judgment of the District Court, homologating the report of commissioners appointed under the statute of 1832, for opening and widening streets, and the assessment of damages, may be appealed from, by any person interested, and making opposition, when the sum in contestation exceeds three hundred dollars.. .....*Municipality No. 2*, vs. *Lawrence et al.*, 305

16. The manner in which a case is brought before the District Court, forms no reason why its judgment should not be reviewed by the appellate court..... ..... *ib.*

17. A further extension of time to bring up and file the record, can only be asked for *at the term and time* it is made returnable. It will not suffice to apply at the term allotted for hearing appeals, when that is not the term to which it is made returnable..... .....*Hart* vs. *Fisk*, 363

18. Where the clerk's certificate does not show that the record contains all the evidence adduced, and there is no statement of facts, the case will

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not be examined on the merits; but if the bills of exception enable the court to examine the questions of law, which arose during the trial, the appeal will be maintained.....*Bailey etc.* vs. *Hickman.* 415

19. The provisions of article 900 of the Code of Practice, relate to cases in which the appellant seeks to obtain from the judge, a statement of facts, or his signature to bills of exception, and not to applications for time, and a *mandamus* to the judge *a quo* to complete the record.....*Bass* vs. *Barton*, 437

20. At any time before, or at the argument of the cause, the appellant may obtain further time, and a *mandamus* to the judge *a quo*, to complete and bring up the record. Time is given until the next term, to complete and file the record..... *ib.*

21. The residence of an appellee may be shown *aliunde*, by affidavit offered in the Supreme Court, to be in another state, and service of the process of appeal on his attorney will be good, notwithstanding he states in his original petition that he is "a resident of the state."

Kimball's Administrator vs. *Dunn's Heirs*, 445

22. In making service of petition and citation of appeal on the attorney of the appellee, it is only necessary to state they were left at the attorney's domicil, if not made personally..... *ib.*

23. The sheriff's return is not required to state that copies of the petition and citation of appeal, were left at the *usual* domicil of the appellee, when it is not shown he had several domicils..... *ib.*

24. It is sufficient to maintain the appeal, if copies of the petition and citation come up with the record, instead of the originals.

Harris vs. *Allnutt et al.*, 465

25. The appellee may file an answer to the merits, and on the same paper make a written motion to dismiss the appeal.....*Briggs et al.* vs. *Briscoe*, 468

26. If the citation be issued before the appeal bond is filed, the appeal will not, on that account, be dismissed. It is irregular, but it would be nugatory to issue another citation..... *ib.*

27. All the parties in a suit who have an interest to maintain the judgment, must be cited in the appeal, or it will be dismissed; so, warrantors must be cited, even where there is judgment for the defendant.

Cuny vs. *Robert et al.*, 474

28. If the clerk's certificate to the foot of the record, states that it contains "a transcript of all the proceedings had, *and all the evidence adduced on the trial*," this will be sufficient to sustain the appeal without a certificate that the testimony was taken down in writing at the request of one of the parties, to serve as a statement of facts, &c...*Gorton* vs. *Gorton's Executor*, 476

29. When there is not sufficient time to cite in the appellee by the *return day*, the clerk cannot alter the time by inserting a prolongation of the day of

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appearance in the citation. The day on which the party is cited, must be the one fixed by the judge, and be expressly stated in the citation.

Ginn vs. *Clack*, 480

30. The appellee may file his motion to dismiss the appeal at any time within three days, after the day on which he is cited to appear; and this right he has, even if the record be filed sooner, and the cause set for trial. *ib.*

31. Where there was not time to cite in the appellee, on the return day fixed by the judge, the appeal was, on motion, dismissed..... *ib.*

32. Where there was not time to cite in the appellee, on the return day fixed by the judge, the appeal was, on motion, dismissed.

Hempkin vs. *Averett*, 482

33. But where there is not time to cite the appellee to the next term, the return day should be fixed for the first day of the succeeding term..... *ib.*

34. If the term to which the appeal is made returnable, entirely fails, it will be *in time* to file the record within the first three judicial days of the succeeding term.....*Kirkman et al.* vs. *Butler*, 535

35. Where there was no entire failure of the term to which the appeal was returnable, and the court was opened on three several days, although it transacted no business, yet the record should have been filed within that time, and not having been done, the appeal was dismissed..... *ib.*

36. The appellant may obtain further time to perfect the record, if *at the time or before* the argument of the cause, he moves the court to this effect. He was allowed until the next term to procure a complete certificate, and in the mean time, the judgment in the appeal was suspended.

Vacocu's Widow and Heirs vs. *Pavée*, 537

37. The clerk is required by law, to certify that the record contains all the evidence *adduced on the trial*. Without this certificate, the Supreme Court cannot examine the case on its merits..... *ib.*

38. The judge who tries the case, may certify that the record contains all the evidence adduced on the trial, because this is a mode of making a statement of facts..... *ib.*

39. Service of a copy of judgment *nisi*, made on a person *residing* at the defendant's domicil, is irregular, because he may be found in the street or elsewhere. The return should state, that a copy of the process was *left at defendant's domicil*..... .....*State etc.* vs. *Johnson et al.*, 547

40. Service of the petition and citation of appeal on a particular person, as the "*administrator*" of the defendant, when there is nothing in the record to show that he really is administrator, or has the capacity to represent the heirs, is insufficient, and the appeal will be dismissed.

Gill et ux. vs. *Hudson*, 553

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41. If the citation of appeal wants the seal of the court from which it issued, it is insufficient, and the appeal will be dismissed on motion by the appellee.....*Ward's Heirs* vs. *Bowman*, 571

42. The irregularities of bringing up the appeal and citing in the appellee, are none of them waived by filing any grounds for the dismissal of the appeal..... *ib.*

42. An appeal will not lie from a judgment or order of the Probate Court, ordering an inventory, and the appointment of an attorney of absent heirs, even when it is urged the will dispenses with this, and that the property is all devised to the instituted heirs.....*Zaire* vs. *Bodin*, 611

43. If a question of fact is raised in the Supreme Court, the case will be suspended on the appeal, until the fact be tried and ascertained in the court which granted the appeal.....*Brown's Executor* vs. *Williams et al.*, 613

44. So, if the right or interest necessary to entitle a party to an appeal, be contested, and depends on a fact to be inquired into, the appeal will be suspended for that purpose..... *ib.*

ARREST.

1. Where a debtor was arrested and held to bail, for a debt not yet due, on the plaintiff's oath that he was about to remove for the purpose of defrauding his creditors, and the affiant states, as the grounds of his belief, that the defendant being largely indebted, gave out that he was going to travel northwardly, while his real intention was to go to Texas; *Held*, that the affidavit was sufficient to maintain the arrest.

Desha, Bradford et al. vs. *Solomons*, 272

2. No error or informality in the petition, vitiates an arrest legally made *ib.*

3. Emancipated minors are not exempted from arrest, for debts legally contracted by them, *after* their emancipation.

Merchant's Insurance Company vs. *Barroso*, 411

ATTACHMENT.

1. Before the plaintiff can obtain an attachment he must make a declaration under oath, at the foot of his petition, stating the *amount of the sum due to him*.....*Flower et al.* vs. *Griffith's Heirs*, 345

2. So where the affidavit declared that "*a sum exceeding two thousand dollars* was due," the sum due was considered as stated with sufficient certainty, to sustain the attachment for that amount..... *ib.*

3. Garnishees cannot claim a preference over the attaching creditor, when they have not made advances on the goods attached. But where they

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are creditors of a firm, whose property is attached in their hands, by a creditor of an individual partner of that firm, they will have a preference over the attaching creditor.....*Gardiner et al.* vs. *Smith*, 370

4. The attaching creditor will have a preference over the consignee, who claims the property in payment of a debt due by the consignor, when the attachment is levied before delivery to and possession by the consignee.
Wilson et al. vs. *Smith*, 375

5. A delegation of the proceeds of sales of certain cotton for the discharge of a debt cannot place the delegated creditor in a better situation than an actual purchase and payment of the price; and neither can avail against an attaching creditor, when there has been no delivery..... *ib.*

ATTORNEY OF ABSENT HEIRS, &c.

1. The law does not authorize the appointment of an attorney to absent heirs in every case. When a court is required to make such appointment, it ought to demand proof of the fact which authorizes its action; *de non apparentibus, et non existentibus eadem est lex.*
Robouam's heirs vs. *Robouam's Executor*, 73

2. So, in a case where the testator has made a valid disposition of his estate by will, and appointed his executor with *seizin: Held*, that the Court of Probates erred in appointing an attorney of absent heirs, without evidence of the existence of any..... *ib.*

BAIL.

1. The majority of the court were of opinion, that the district attorney had the choice of remedies, and could proceed against sureties in bail bonds in criminal cases by ordinary suit, and waive the summary mode of proceeding, under the statute of April 2d, 1835. The state may select any legal means of instituting suit, which individuals may resort to.
State, &c. vs. *Norment, et al.*, 511

2. Where the sureties on bail, produced the principal *on the day* and when called, according to the tenor of their bonds, who was arraigned and found guilty by the jury on two indictments, and afterwards *disappeared: Held*, that the sureties were not discharged, because the bond stipulated that the principal shall appear at court, and not depart thence, without leave of the court, which was not obtained in this case..... *ib.*

3. When the forfeiture of a bail bond has become a matter of record, it may be put in suit in the ordinary way and perhaps in no other..... *ib.*

4. *Bullard, J., dissenting.* When there is a summary as well as an ordinary remedy provided by law, the party may resort to either at his option;

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but in no case ought this option to be permitted when the law has pointed out a specific remedy, and a resort to another would deprive the defendant of any advantage, and render his condition more onerous.

State, &c. vs. *Norment et al.* 511

5. It is not so clear that when the body of the accused is produced by the bail, and notice given to the district attorney, the bail is not exonerated, without any formal *exoneratur* being entered. According to the English authorities such would be the effect of a surrender by the bail..... *ib.*

6. Judgment *nisi* on bail bond need not be signed by the judge in order that copies be served as notices on the parties. The judge's signature is only required to final judgments.....*State &c. vs. Johnson et al.*, 547

7. Service of citation or notice of judgment *nisi*, made on a person residing at the domicil of the defendant, found in the street or elsewhere is irregular. The return should state that copies of the process *were left at the defendant's domicil*..... *ib.*

8. Where a judgment *nisi* is directed by law to be made final against bail, &c., at the succeeding term, and the court fails, it may be done at the following term. The law, in this respect, is considered as merely directory, *ib.*

9. On a motion to make such judgment final, the proceedings are summary, and no particular day need be assigned for trial..... *ib.*

BILLS AND PROMISSORY NOTES.

1. The defendant being sued on his note, formally denied his signature, and it was proved. He afterwards objected to the plaintiff's right to recover, because he did not prove title to the note: *Held*, that having formally denied his signature, he was prohibited from every other means of defence.

Cochran vs. *Perry*, 11

2. In a suit on a promissory note, signed by the husband and wife jointly, and there was no proof of his signature, or authorization to her to sign it, but she recognized the debt in her will: *Held*, that no recovery can be had against her succession, because she could not contract such a debt during marriage, without the authorization of her husband, which is not shown.

Maddox vs. *Maddox's Executor*, 13

3. Where a note is endorsed in blank by the payee, it passes by delivery; but in a transfer and sale by the payee, the transferee may disregard the endorsement, and proceed on the act of sale.

Denton vs. *Duplessis*, 83

4. Where the payee of a note, endorsed by him and even another after him, in blank, is in possession of it, he may sue and recover by the executory process, when the note is identified with the mortgage.

Mourain vs. *Devall et al.*, 93

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5. When the payee is in possession of a note, on which his name is endorsed in blank, no proof of a re-transfer is necessary to enable him to recover.....*Mourain* vs. *Devall et al.* 93

6. So, the payees of a bill of exchange, with their names endorsed in blank, are entitled to sue and recover from the acceptor, without showing a re-transfer, when there are subsequent endorsers.

Hill et al. vs. *Holmes & Smith*, 96

7. If the payees have continued in possession, or have endorsed the bill to a third party, and taken it up under protest, they are equally entitled to recover against the acceptor..... *ib.*

8. In an action by the holder against the maker of a promissory note, where it is shown by authentic act, that the note sued on was delivered to the plaintiff, endorsed in blank by the payees, as the price of real estate, sold by him to the defendant, he will recover without proof of any of the subsequent endorsements.....*Freeland* vs. *Hodge*, 177

9. Where a note is *not* acquired in the ordinary course of business, but was executed and given by the defendant to the plaintiff as the price of real estate, the payees and endorsers thereon, will be considered in the light of sureties..... *ib.*

10. The original holder of a note endorsed in blank, being in possession, he may sue the maker and recover without proving the endorsements, except the payee, as the note passes by delivery..... *ib.*

11. Where a bill of exchange is not presented for acceptance, nor for payment until two days after the expiration of the last day of grace, the drawer is released, unless the holder shows that the drawee had no funds of the drawer in his hands.....*Fulton Company* vs. *Wright et al.*, 386

12. The drawer of a bill is presumed to have funds in the hands of the drawee, and has a right to require that the payee should present it for payment on the last day of grace, and on failure of payment, to have it protested, and legal notice given..... *ib.*

13. Where the vendors of a steamboat take a bill of exchange for the price, reserving a privilege and mortgage on the boat to secure payment, and the bill is not paid by the neglect of the holder in not using due diligence, the mortgage which is but an accessory to the debt is extinguished with it..... *ib.*

14. A bill of exchange must be presented for payment to the drawees, on the day it becomes due, or the drawer will be discharged....*Grant* vs. *Long* 402

15. No irregularities of the mail which prevent a bill from arriving in season, will excuse its non-presentation for payment on the day it falls due. *ib.*

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16. A note made payable on a particular day *without defalcation*, is entitled to the usual days of grace, before it is protested for non-payment. The words, *without defalcation*, imply that it is to be paid without diminution or set off, in favor of the maker or endorser.

M'Donald vs. *Lee's Administrator*, 435

17. In an action against the maker of a note, the plaintiff must prove a demand of payment, made at the place indicated in the obligation, before he can recover.....*Warren* vs. *Allnutt*, 454

18. The notary's declaration or certificate of protest, must state specifically the names of the drawer and endorser, and the time and manner of serving and forwarding the same, and be recorded, to afford legal proof of notice.....*Harris* vs. *Allnutt et al.*, 465

19. Where the endorsers are discharged from liability, for want of legal notice of the dishonor of the note, but assume the payment, and propose to arrange and take up the note, it will not be binding on them when the other party fails to show, they were *not* ignorant of their rights, and of their discharge for want of notice..... *ib.*

20. In an action against the maker of a note, endorsed by the payee in blank, the endorsees and holders must prove the endorsement of the note to them, before they can recover.....*Briggs et al.* vs. *Briscoe*, 469

21. In an action against the drawer of a bill, or maker of a note, a demand of payment and presentation of the bill or note at the place indicated on its face, are indispensable, and must be shown, to enable the plaintiff to recover.....*Warren* vs. *Briscoe*, 472

22. Where endorsed notes are taken at probate sale, *paraphed* "*ne varietur*," the executor may take out an order of seizure and sale, as against the maker and mortgaged property, on the production of the *procés verbal* of sale, without making any proof of the endorsements on the note. The endorsers in such cases are considered in the light of sureties.

Gorton vs. *Gorton's Executor*, 476

23. A note secured by mortgage must be presented, and a demand of payment *alleged and proved* to have been made at the place designated, before an order of seizure and sale can be supported to enforce payment.

Moss vs. *Byrnes*, 615

24. The plaintiff may strike out special endorsements on a note in suit, at the time of the trial.....*Bullock* vs. *Nally et al.*, 619

25. It is no objection that a note is made part of the petition, to the right of the plaintiff to strike out special endorsements at the trial; for it is made part only with a view to verify what is written, and does not require proof of the signatures which may be stricken out..... *ib.*

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BILL OF LADING.

1. A bill of lading, although it acknowledges the goods were shipped in good condition, does not authorize the acknowledgment to extend beyond the external appearance of the packages containing the merchandize.

Curell vs. *Johnson*, 290

CITATION AND PETITION, SERVICE OF.

1. The acceptance of service of citation has the same effect as if it had been served by the sheriff.....*Sexton et al.* vs. *Brooks' Heirs*, 596

2. The acceptance of service of a defective or insufficient citation by the party, or his attorneys, does not waive or cure any irregularities in the citation itself..... *ib.*

3. If a defendant only left the state temporarily, he does not thereby lose his domicil; and if permanently, the house in which he last resided, is the place where service of citation and other process may be made.

Brown vs. *Trent*, 600

4. In the silence of the code as to the manner of serving notice of judgment, it is the most reasonable to adopt the practice which would be required in the service of original process..... ... *ib.*

5. Notice of judgment must be served in the same manner, as in serving petitions and citations in the first instance..... *ib.*

6. Service of citation and petition of appeal on a person, stated in the sheriff's return to be *administrator* of the deceased party, when it does not appear from the record that he is such, is bad, and the appeal will be dismissed.....*Gill et ux.* vs. *Hudson*, 553

7. If the citation of appeal wants the seal of the court, it is insufficient, and the appeal will be dismissed on motion.....*Ward's Heirs* vs. *Bowmar*, 571

8. Where the defendant acknowledged service of the petition and filed an answer to the merits, and rendered his account as administrator, it is a waiver of service of citation, and he cannot afterwards except for want of such service and proof of the plaintiff's capacity to sue.

Reynolds's Tutor vs. *Reynolds's Administrator*, 617

(SEE ALSO APPEAL.)

COLLATION.

1. A minor grandchild, inheriting in right of its mother, *jure representationes*, is not bound to collate the value of a slave given to it by the deceased grandfather, before the death of its mother.

Mason vs. *Mason's Widow and Heirs*. 589

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COMMON CARRIERS.

1. A person, as a carrier for compensation, who sacrifices the property of another, to save his own, is bound to pay for the property so sacrificed.
Nickle vs. *Buckner*, 321

2. Where a steamer took a keel-boat in tow along side, and, to avoid a snag, changes her course, by which the keel-boat is snagged, the steam-boat is bound to pay for the loss..... *ib.*

3. But if the accident was inevitable to the keel-boat, by keeping their course, and by a change the steam-boat would have been injured, her owners are not liable for the loss of the keel-boat..... *ib.*

4. Freighters or shippers of goods have a privilege on the vessel for the amount of damages occasioned by the failure in delivering the goods, through the fault of the captain or owner.
Stinson et al. vs. *Schooner Pennsylvania*, 332

5. Where the master and owner of a vessel lands goods at an intermediate port, and ships them to their place of destination on board of another vessel, without the consent of the shipper, and they are lost, he is liable for the amount of the loss..... *ib.*

CONSIGNOR AND CONSIGNEE.

1. The party, or consignee, who claims to have a privilege on property consigned, for *advances*, must show, *affirmatively*, that the property was at his disposal, or that he had received a bill of lading, or letter of advice, *previous* to the seizure, or he cannot hold against an attaching creditor.
Hyde & Goodrich vs. *Smith et al.*, 144

2. A party making advances, for and on account of a vessel in a foreign port, and who executes a bond, to obtain her release from seizure, conditioned to pay the amount of forfeiture, in the event of its being declared by the supreme judicial tribunal of the country, is entitled to recover full indemnity for such advances, *and the penalty* of his bond, from the owner; reserving to the latter the right to recover back the penalty, in case the forfeiture is remitted.....*M'Gregor* vs. *Brittingham et al.*, 182

3. The attaching creditor will have a preference over the consignee, who claims the property in payment of a debt due by the consignor, when the attachment is levied before delivery to and possession by the consignee.
Wilson et al. vs. *Smith*, 375

4. Where cotton is shipped to a consignee, who is a creditor without privilege, the property of the cotton still remains in the consignor, until delivery to the consignee..... *ib.*

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5. Where A consigns property to B, to sell and pay C, and C accepts the delegation, the consignor can make no other disposition of it.
Wilson et al. vs. *Smith*, 375

6. The possession of the master of the boat or vessel is that of the consignor; and when the consignee has made no advance on the property, and having neither possession, or a privilege under the code, the attaching creditor will take it in preference..... *ib.*

CONTINUANCE.

1. When a cause is called for trial, the party who has not been able to procure the necessary evidence shall be entitled to a continuance, on satisfying the court, by his affidavit, of the materiality of the facts on which he relies to obtain a continuance.....*Winchester* vs. *Righter*, 256

2. The mere act of taking out a summons for witnesses, and handing them to the sheriff, is insufficient ground on which to obtain a continuance. *ib.*

3. A continuance may be granted on the day fixed for the trial, but the materiality of the evidence must be shown and sworn to..... *ib.*

4. A reasonable time will be allowed for the return of a commission sent to a distant parish to take evidence. In a Court of Probates, sitting monthly, a continuance should be granted with more facility than in a District Court, which only sits semi-annually...*Kimball's Administrator* vs. *Dunn's Heirs*, 445

5. The absence of one of the counsel, when there are two employed, cannot be urged by the one present as grounds for a continuance, because the other is the principal in the cause. If it were otherwise, a party could always obtain a continuance, by requesting his principal counsel to absent himself.....*Brown's Executor* vs. *Faulk's Administrator*, 592

CONTRACTS.

1. The legislature has no right, perhaps, to add to the obligations or responsibilities which flow from a contract at the time it is made; or to abridge any of the rights which it conferred.....*State* vs. *Judge Bermudez*, 352

2. So, acquired rights, and existing contracts, cannot be affected by subsequent legislation; but, in relation to remedies, forms of proceeding, and limitation of actions, a different principle applies, and the legislature may modify them..... *ib.*

3. The monition law of 1834 is a remedial statute, and applies as well to sales made before, as since its passage..... *ib.*

4. It is delivery only, in a contract of sale, which transfers the property; so, also, in *a datien en paiement*..... .....*Wilson et al.* vs. *Smith*, 375

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5. In seeking for the intention of the parties to a written contract, the whole of it must be examined, and, if possible, effect given to every part.
Millikin vs. *Minnis*, 539

CORPORATIONS.

1. Corporations are not absolutely bound, *literally* to use the name and style given them in their acts of incorporation. A slight alteration in stating the name is unimportant, if there be no possibility of mistaking the identity of the corporation suing.....*Mechanics' and Traders' Bank* vs. *Prescott*, 444

COURTS.

1. The federal and state courts are considered foreign to each other, even when sitting in the same state.....*Hampton's Heirs* vs. *Barrett*, 159

2. The Probate Court has power to decide on the character and validity of sales of land and slaves, when the question arises collaterally, in the examination of matters in which it has jurisdiction; as in ascertaining what property belongs to a succession, and in partitioning property among heirs.
Henry vs. *Keays et al.*, 214

3. The District Court has authority to ordain and regulate a partition of property held in common, by other title than hereditary succession, at the suit of a co-proprietor. It is the ordinary action *de communi dividando*..... *ib.*

4. The District Court is not without jurisdiction *rationæ materiæ*, in an action of partition between co-heirs, and joint owners of immoveable property, of full age, inherited from a deceased sistor..... *ib.*

5. The testator, leaving a forced heir, cannot, by the provisions of his will, dispense with the intervention of the Probate Court, and the forms of law required in making the inventory of his estate.
Chase, Under Tutor, vs. *Matthews's Executors*, 357

CURATOR AD HOC.

1. A curator *ad hoc* to an absentee, should be appointed to represent him and defend the suit, when he is not otherwise represented in the state.
M'Micken vs. *Smith et al.* 155

2. A curator *ad hoc* must be appointed to minors, or other persons intended to be sued, and who are without a curator *ad litis*, or who are absent and not represented in the state.....*Kimball's Administrator* vs. *Dunn's Heirs*, 445

3. A curator *ad hoc* cannot be legally appointed to prosecute the removal of a tutor or tutrix from office, when there is an under tutor in office. He alone can be authorized to act... *M'Guire, Curator ad hoc*, vs. *Ross, Tutrix*, 575

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4. The intervention of one of the minors, after her emancipation by marriage, cannot cure the nullity resulting from the appointment of a curator *ad hoc*, to remove a tutor, when there is an under tutor in office.
M'Guire, Curator ad hoc vs. *Ross, Tutrix*, 575

5. A curator *ad hoc*, under a void appointment, cannot require the tutor to render an account, or make opposition to it when rendered..... *ib.*

6. Curators *ad hoc* may be appointed, in particular cases, for the benefit of persons having suits to institute against absentees, who cannot otherwise arrest or attach the property of such absentees, or make service of citation, either personally or at their domicil.....*George* vs. *Fitz Gerald*, 604

7. In the case of Guillet *vs.* Erwin, 7 *Louisiana Reports*, 530, if it had been urged, that prescription would have been interrupted by the appointment of a curator *ad hoc* to the defendant, the plea of prescription might probably have been supported..... *ib.*

8. So, where a defendant *resides* in another state, and never had any agent or domicil here, and has no property or interest in this state, he may, nevertheless, be *sued here* in a personal or redhibitory action, by the appointment of a curator *ad hoc* to defend him..... *ib.*

DAMAGES.

1. The act of congress which passed in 1832, allowing front proprietors a preference in becoming purchasers of the *back concessions* in their rear, gave to them, from the time of its passage, an inchoate right sufficient to maintain an action of damages of waste committed on the land, even before entry and purchase.....*Terrill* vs. *Chambers*, 578

2. When the front proprietor acquires title from the United States to the back concession, since waste has been committed, the party committing it is thereby liberated from any claim which the latter, (*i. e.* the United States,) might have against him for damages. He cannot be liable to two parties for the same injury..... *ib.*

3. The proceedings instituted by a proprietor of land, before the register and receiver, to inquire into the titles of his neighbor's land, arising on *confirmed claims*, although they cause much trouble and expense to the adverse party, form no claim for damages, when it is not shown they were prompted by malice.....*Terrill* vs. *Chambers*, 582

4. When excessive damages are given, the verdict and judgment will be set aside, and the case remanded..... *ib.*

DEBTOR AND CREDITOR.

1. The right of a creditor to attack a sale, as fraudulent, made by his

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debtor to a third person, depends on his showing he was a creditor before the date of the act. But a judgment by the creditor against his debtor, is not conclusive upon the vendee of the debtor, unless he was made a party. He has a right to controvert the demand, and avail himself of every defence the original debtor had.....*Lopez's Heirs* vs. *Bergel, f. w. c.*, 197

2. So, where the vendee of a debtor was sued, he was allowed to plead prescription to the demand of the creditor, on which the latter had obtained a final judgment against the debtor..... *ib.*

3. No creditor can sue, individually, to annul a contract, as fraudulent, made before his debt accrued. So, if a note of the common debtor is prescribed, and he promises to pay it, *after a sale* of his property, his creditors cannot attack the sale as fraudulent, on account of the debt, and sue the vendee..... *ib.*

4. The vendee of a debtor, when sued, has a right not only to resist a judgment offered in evidence against him, to which he was no party, but to insist on the plea of prescription, and the same defence which had been overruled, and finally to offer new testimony..... *ib.*

5. In a suit by a creditor against the vendee of his debtor, to annul a sale by the latter, the judgment against the common debtor is admissible in evidence only to prove that such a judgment had been recovered, but the evidence on which it was obtained is inadmissible. The return of *nulla bona*, on the execution, is admissible to show the inability of the debtor to pay..... *ib.*

DOMICIL.

1. A person may change his domicil at will, and any restraint on his choice would be an abridgement of his rights: So, every citizen is allowed to select his domicil, as his interest, inclination, or even caprice, may direct. *Hennen* vs. *Hennen*, 190

2. It is sufficient to effect a change of domicil, if the *act* of residing in another parish be combined with the *intention* of fixing a residence there, even when the party resides alternately in two parishes..... *ib.*

3. Where a resident of the parish of Orleans elected his domicil in the parish of St. Tammany, and made his declaration, in writing, before the parish judges, of the parish from which and to which he removed, according to law, and resided alternately in each, had a dwelling house on each establishment, and transacted business in both, but held office and voted *only in the latter: Held*, that this is a complete and legal transfer of domicil, so as to entitle him to be sued in the parish to which he has transferred it. *ib.*

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DONATION.

1. The right of reversion, on condition that the donor survives the donee and *his descendants*, does not accrue so long as any of the descendants of the donee survive.....*Seghers* vs. *Schmidt*, *Tutor*, etc., 207

2. So, where it was stipulated by the father, who gave his daughter certain real and personal property, and slaves, on her marriage, that, in case he survived her *and her descendants*, the donation should return to him, and the donee died, leaving four children, one of whom also died: *Held*, that no part of the donation reverted, so long as descendants of the donee were living..... *ib.*

DOWRY.

1. Sustenance for the year of mourning can only be claimed by a widow who has brought dowry to the marriage. It is allowed as compensation for the delay in recovering back her dowry, if she prefers it to the interest.

Michot vs. *Flotte's Administratrix*, 129

2. The estimated value of slaves settled as dowry does not transfer the property in them to the husband, without an express declaration to that effect in the marriage contract. So, the husband comes under no express obligation to pay the price of slaves thus estimated, than of lands which are *dotal*, which cannot, even by express agreement, become his property.

Bourg vs. *Trahan's Heirs*, 278

3. There must be a definite *price* fixed for slaves constituted *dot*, which the husband is bound to pay, or there will be no sale to him of the property. *ib.*

EVICTION—SEE WARRANTY.

EVIDENCE.

1. Evidence of the contents of letters having no relation to the allegations in the pleadings, will not be received.

Colsson vs. *Consolidated Association Bank*, 105

2. A paper containing an amicable demand in writing by the plaintiff, is inadmissible in evidence, when it is so manufactured by him, as to corroborate some of the material allegations of the petitioner's demand..... *ib.*

3. In relation to matters *en pais*, a general allegation will entitle the party to introduce his evidence, unless the adverse party calls for particulars; but when an authentic act is attacked, the nullity, informality, or fraud must be specially alleged to admit evidence of it..... *ib.*

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4. So, where the wife sued to annul an act, in which she renounced her right of mortgage in favor of her husband's creditors on general allegations of informalities, deception and error, she was precluded from introducing evidence to show that the act was not read to her..... *ib.*

Colsson vs. *Consolidated Association Bank*, 105

5. In an action by the wife to rescind her renunciation on the ground that the debt secured did not accrue to her advantage, the judgment of separation of property from her husband, will only be received in evidence *rem ipsam*. She must prove her demand *aliunde*..... *ib.*

6. In an action of partition, in which the plaintiff claims to be joint owner of one-half of the land, the joint petition of him and the defendant to the register and receiver claiming the same land, and their joint answer to a suit against them for it, are admissible in evidence to show the respective rights of the parties.....*Michel* vs. *Davis's Heirs*, 152

7. The affidavit of a party is admissible in evidence to show the loss or destruction of his titles, by supporting the circumstances which render the loss probable.....*Gravier's Curator* vs. *Rapp, f. w. c.* 162

8. So, where the destruction of the dwelling house is shown by proof, the oath of the party will be received in evidence, to show that his title deeds were destroyed with it..... *ib.*

9. Payment of some of the instalments of the price; occupation of the premises ten years in the knowledge of the plaintiff; having them surveyed and building a house thereon, all taken together, furnishes circumstantial or presumptive proof of ownership, when the written title is shown to be lost. *ib.*

10. When the plaintiff fails to produce satisfactory evidence of his demand, on a plea of the general issue, he will be non-suited.

Duplantier vs. *Barker*, 167

11. Parole evidence will not be received to show that the husband purchased certain property at the probate sale of the mother-in-law's succession for his wife.....*Stokes* vs. *Shackleford et al.* 170

12. The vendee of a judgment debtor, when sued by the creditors, has a right not only to resist such judgment as evidence against him, to which he was no party, but to insist on the plea of prescription with the same defence which had been overruled and to offer new testimony.

Lopez's Heirs vs. *Bergel f. w. c.* 197

13. In a suit by a judgment creditor against the vendee of his debtor, to annul the sale, the judgment against the latter is admissible in evidence *only* to prove that such a judgment was recovered, but the evidence on which it was obtained is inadmissible. The return of *nulla bona* on the execution is admissible in evidence in such case, to show the inability of the debtor to pay..... *ib.*

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14. The plaintiff may offer his own advertisement in evidence, in claiming the value of stolen goods, as a circumstance going to identify the goods, and occuring before the institution of suit.....*Patterson* vs. *Behan et al.* 227

15. Parole evidence is inadmissible to prove that a corporation, as an insurance company, in its corporate capacity, undertook a certain risk for which it is legally liable. In general, corporations can only contract in writing, through their official organ, although their assent to certain contracts may sometimes be inferred from their silence or acquiescence.

Courtnay et al. vs. *Mississippi Marine and Fire Insurance Company*, 233

16. The husband's acknowledgment in the marriage contract, that he has received, and is accountable for her *dot*, furnishes no evidence of payment in favor of the wife's claim, against third possessors and creditors of the husband.....*Dimitry et ux* vs. *Pollock et al.*, 296

17. A judgment obtained by the wife against her husband for the recovery of her dowry, will not be received as evidence of her claim against third possessors and creditors of her husband, when its existence is denied, and it is alleged to have been obtained by collusion, and without proper evidence..... *ib.*

18. *Prima facie* evidence of the wife's claim for her *dot*, is not sufficient to authorize her to proceed against third possessors of the husband's property..... *ib.*

19. Under the averments, that the "goods to the amount mentioned in the policy of insurance, were not lost, and that the insurer suspected, and had reason to suspect, that the pretended loss was altogether fraudulent," evidence will be received to prove that the plaintiff had *not* the goods when the loss occurred, and that it was fraudulent.

Brugnot vs. *Louisiana State Marine and Fire Insurance Company*, 326

20. Presumptive, as well as direct evidence, will be received to establish the fact that, the plaintiff set fire to his own store, with the intention to defraud the underwriters.

Regnier vs. *Louisiana State Marine and Fire Insurance Company*, 336

21. Presumptions and circumstantial evidence in a case, may be insufficient to convict in a criminal prosecution for arson; and yet sufficiently strong to prevent a recovery on a policy of insurance, when the claimant is charged with attempting to defraud the underwriters..... *ib.*

22. Patents or title papers are inadmissible in evidence in a possessory action; but may be read to the jury in explanation of motives, and in mitigation of damages, in a *mixed action* for possession and vindictive damages.

Baily &c. vs. *Hickman*, 415

23. A certificate of the appointment of a curator must be given and cer-

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tified from the records by the clerk, when there is one acting in the Probate Court, in order to be received as *evidence* of the appointment and capacity of the curator to act. The certificate of the probate judge is insufficient.
Reynolds' Curator, &c. vs. *Mahle*. 424

24. Parole evidence is admissible, first to show the form of a contract between plaintiff and defendant, whether it be written or verbal; and if the latter, to make proof of it.....*Hogan* vs. *Gibson*, 457

25. Evidence of a verbal contract will not be admitted until the court is satisfied there is no written one; and when the court permits evidence of a verbal contract to go to the jury, it is proof to them that there is no written one ..... *ib.*

26. When the evidence shows the ownership of the note sued on to be in the plaintiff at the institution of suit, he will recover, notwithstanding his attorney may have improperly erased the blank endorsements, showing the regular transfer by endorsement to him.....*Friend* vs. *Bowmar*, 461

27. Where the evidence is contradictory, and the case turns on facts, if the judgment is not manifestly erroneous it will be affirmed.
Garrett vs. *Knox's Administrator*, 463

28. Where there is no evidence in the record of the laws of the state, where the transaction or contract in question was made, it will be decided according to the laws of this state.....*Harris* vs. *Allnutt et al.*, 465

29. Where the answers on facts and articles touching the law of another state in relation to interest, show that there is a statute law on the subject, the statute must be produced as the best evidence.
Mason vs. *Mason's Widow and Heirs*, 589

30. Parole evidence, admitted to show the act of putting in possession in a manner manifestly erroneous and inconsistent with the written evidence of title, will be disregarded.....*Millikin* vs. *Minnis*, 539

EXCEPTIONS.

1. If the judge be requested by either party to charge the jury in a particular way, and he refuses, a bill of exceptions may be taken to such refusal, which should be signed by the judge, even after the jury returns with their verdict.....*State* vs. *Judge Buchanan*, 202

2. An exception may be taken to the *charge*, or the refusal of the judge to charge the jury as requested, at the time, but the bill of exceptions may be drawn up, and submitted for the signature of the judge, within a reasonable time thereafter and before judgment is signed..... *ib.*

3. The petition must contain the name and surname of the plaintiff; and

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an exception showing that only the *initials* of the plaintiff's christian name are stated in the petition, will be sustained and the case remanded.

Lee & Hardy vs. *Rice et al.*, 254

4. Where an objection is made to a note being received in evidence, on the ground that there is a material variance between it, and *that* described in the petition, the party objecting must point out the discrepancy in his bill of exceptions.....*Hennen* vs. *Wetzel*, 265

5. Bills of Exception must set out the grounds and every thing necessary, to enable the appellate court to determine whether the inferior court erred or not..... *ib.*

6. After judgment by default, which is equivalent to issue joined, it is too late to take an exception to the plaintiff's capacity to sue.

Reynolds, Tutor, &c. vs. *Reynolds' Administrator*, 617

EXECUTORS, ADMINISTRATORS AND CURATORS.

1. Where an executor has the seizin, and is appointed detainer of the estate of the testator in the will, he is entitled to full commissions on all the estate, both on that which is unsold, and the debts uncollected, when none of the latter appear to be due by insolvents.

Robouam's Heirs vs. *Robouam's Executor*, 73

2. A charge of a *round sum* in a notary's account for taking an inventory, and delivering copies, &c., is illegal, and contrary to the tariff even in succession matters, and should be disallowed by the executor; or it will be stricken out by the court on opposition..... *ib.*

3. The functions of an administrator, do not, like those of an executor, cease at the end of the year, but continue until the administration of the estate is finished.....*Michot* vs. *Flotte's Administratrix*, 129

4. The administrator is responsible for any sum falling to the estate of the deceased by inheritance, after his death, and which comes into his hands as administrator, even after the inventory is taken; and he is also entitled to his commissions on the same.

Pinnell et al. vs. *Scriber's Administrator*, 608

5. But where the administrator surrenders a claim in favor of the deceased on his father's estate, to his widow, and omits to place it in his account of the administration, he will not be allowed to present a second account including this item, with his full commission charged thereon..... *ib.*

6. Where the court is unable, from the evidence, to strike a final balance in the settlement of an administrator's account, the case will be remanded. *ib.*

EXECUTORY PROCESS.

1. Where a creditor demands the execution of a judgment rendered by a tribunal, different from *that* within whose jurisdiction the execution of it is

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sought, he may resort to the executory process; but this process cannot issue from a court within the same territorial jurisdiction. The party must resort to his *fieri facias* on his judgment.....*Canal Bank et al.* vs. *Copeland*, 34

2. The payee of notes endorsed in blank by himself, secured by a mortgage, and marked *ne varietur*, may sell and transfer the notes and mortgage by authentic act to a third person, who will acquire such title thereby as will authorize him to sue out an order on seizure and sale.

Denton vs. *Duplessis*, 83

3. So, where the holder of certain notes, endorsed in blank by the payee, who shows himself to be the transferee by authentic evidence from the payee, he is entitled to an order of seizure, on the mortgage with which the notes are identified, independently of the endorsement..... *ib.*

4. Where the payee of a note with his endorsement in blank, is in possession of it, he may resort to the executory process and disregard the endorsement, when the note is identified with a mortgage.

Mourain vs. *Devall et al.*, 93

5. An order of seizure and sale cannot be sustained on a judgment, which is neither alleged or shown to have been recorded.....*Brou* vs. *Kohn*, 102

So, an order of seizure and sale cannot issue against property in the hands of a third possessor, unless the act of mortgage is duly recorded and produced..... *ib.*

GARNISHEE.

1. No recovery can be had against the garnishee until judgment against the principal debtor.....*Proseus* vs. *Mason et al.*, 16

2. A garnishee is required to answer interrogatories within the legal delay, or his neglect is to be considered as a confession of having funds of the defendant's in his hands; but this does not prohibit him from answering after the legal delay, provided no steps are taken in the mean time to fix his responsibility..... *ib.*

3. Where an act is to be done within a given time, (as the filing an answer, etc.,) it may be done afterwards, if nothing occurs to prevent it. So, a garnishee may answer interrogatories *after the legal delay*, and at any time before the cause is set for trial, or, perhaps, at the trial, and they will not be taken for confessed..... *ib.*

4. Garnishees cannot claim a privilege, or preference, on goods attached in their hands, when they have not made advances on *the identical goods* attached.....*Gardiner et al.* vs. *Smith*, 370

5. But where the garnishees are creditors of a firm, whose property is attached in their hands by a creditor of an individual partner of that firm, they will have a preference over the attaching creditor..... *ib.*

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HEIR.

1. Where the mother, as natural tutrix, exchanges certain slaves of the community for a tract of land, the son, *as heir* of his father, may sue and recover this land from a third possessor, to whom his mother illegally conveyed it. The institution of suit amounts to a ratification of the exchange and purchase of the land for his benefit.....*Blount* v. *Simms*, 173

2. The testator, leaving a forced heir, cannot, by the provisions of his will, dispense with the intervention of the Probate Court, and the forms of law, required in making the inventory of his estate. His power over the legitimate portion of the forced heir ceases at his death.

Chase, under tutor, etc., vs. *Matthews's Executors*, 357

HUSBAND AND WIFE.

1. In a suit on a promissory note, purporting to be signed by the husband and wife jointly, and there was no proof of his signature, or authorization to her to sign it, but she recognized the debt in her will: *Held*, that no recovery can be had against her succession, because she could not contract such a debt during marriage, without the authorization of her husband, which is not shown.....*Maddox* vs. *Maddox's Executors*, 13

2. Where the wife is desirous to sell her paraphernal property, and her husband refuses his authorization, she must apply to the parish judge of her domicil, who may authorize her to contract, etc.....*Fowler* vs. *Boyd*, 70

3. In an action by the wife, to rescind the renunciation of her right of mortgage, on the ground that the debt secured did not accrue to her advantage, the judgment of separation of property from her husband will only be received as evidence *rem ipsam*. She must prove her claim *aliunde*.

Colsson vs. *Consolidated Association Bank*, 105

4. Where property is purchased by the husband, during marriage, with the funds of the wife, it belongs to the community.

Stokes vs. *Shackleford et al.*, 170

5. The estimated value of slaves settled as dowry, does not transfer the property in them to the husband, unless there be an express declaration to that effect in the marriage contract.....*Bourg* vs. *Trahan's Heirs*, 278

6. So, the future husband does not come under any express obligation to pay the price of slaves, estimated in fixing the amount of dowry, any more than he does of lands that are dotal, which cannot, even by express agreement, become his property..... *ib.*

7. There must be a definite price fixed for slaves which are constituted *dot*, and which the husband is bound to pay, or there is no sale and transfer of the property in the slaves to him..... *ib.*

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8. The acknowledgment of the husband in the marriage contract, that he is possessed of, and is accountable for the *dot* of his wife, furnishes no proof of payment, so as to authorize her to assert her legal mortgage, and recover as against third possessors and creditors of the husband.

Dimitry et ux vs. *Pollock et al.*, 296

9. The wife had the capacity, even before the act of 27th March, 1835, to make a valid renunciation of her dotal and paraphernal rights, on property ceded by her husband to his creditors, when she appears with the creditors, and compounds with them for a part of her debt.

Pannell's Heirs vs. *Overton*, 555

INJUNCTION.

1. A perpetual injunction will not be granted by the court in a case where it is not demanded, and where the right to be secured is not a corporate one, but one common to every inhabitant.

Municipality No. 1 vs. *Municipality No.* 2, 49

2. Nor will an injunction be maintained when the purpose of the suit is to restrain the action of the City Council, when the right claimed is indefinite, and when such injunction might tend to limit a legitimate exercise of authority vested in the Council..... *ib.*

3. A judge is not bound to receive sureties in an injunction bond, residing out of the parish, and whose solvency and sufficiency are unknown to him.....*Mourain* vs. *Devall et al.*, 93

4. In the settlement of the estate of deceased persons, all the property to which they had any right or claim may be sold. A third party cannot arrest the sale by injunction, on pretence that he is the true owner and in possession.....*Seymour* vs. *Bourgeat et al.*, 123

5. An injunction to restrain the sale of a plantation under a *fieri facias*, because all the contiguous tracts of land adjoining are not included in the advertisements, as necessary to its cultivation, etc., will not be sustained. Nor is it ground for an injunction that the plantation was described *as a tract of land*, when it is shown to be cultivated *as a cotton or sugar estate.*

Arnous vs. *Lesassier*, 124

6. The amount of damages to be decreed on the dissolution of an injunction, is within the discretion of the court, under the provisions of the act of 1831..... *ib.*

7. The law allows ten per cent. *interest* on the dissolution of injunctions, but the court will not give it when it is not prayed for by the party..... *ib.*

8. When the surety in an injunction is not before the court on appeal, no

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judgment for interest or damages can be pronounced against him, on dissolving the injunction.....*Spurlock* vs. *Hunter's Heirs*, 564

9. The act of 1831, relative to injunctions, does not say from what date the interest is to run, when they are dissolved; but in this case it is computed from the time the judgment was rendered in the court below..... *ib.*

INSOLVENCY.

1. The syndic is not discharged by the homologation of the tableau of re-partition, where the judgment is silent as to the discharge, although he prayed for it. As long as any thing remains to be done, the functions of the syndic continue.....*Levy* vs. *Jacobs et al.*, 109

2. A cession made by an insolvent debtor, transfers all his property and rights to his creditors, both as to that which is placed on his schedule, and that which is not..... *ib.*

3. Where a tableau of distribution is filed by the syndic, fixing the rank and rights of the creditors, and is homologated, it becomes *res judicata*, and no subsequent alterations, or other claims, can be allowed in a second tableau of distribution filed by the syndic.....*Ory* vs. *His Creditors*, 121

4. An insolvent debtor, in actual custody, who is a merchant or trader, may be discharged from *imprisonment* without depositing his books in court, when there is no opposition by the creditors to his *cessio bonorum*.
Powell vs. *His Creditors* 221

5. All creditors of an insolvent debtor residing out of the state at the time of the surrender, or *cessio bonorum*, are represented by the attorney of the absent creditors.....*Olney* vs. *Walker*, 244

6. The attorney at law of an absent creditor, in his suit against the debtor, does not possess the faculty of representing him in the *concurso* of creditors after a *cessio bonorum*..... *ib.*

7. A merchant who is in failing circumstances, and under protest, may sell and dispose of his property by valid contract to a *bonâ fide* purchaser. The presumption arises, from his being under protest, that he lacks money, and it is necessary to sell property to raise it.....*Thompson* vs. *Gordon*, 260

8. The principle that the property of a debtor is the common pledge of his creditors, is not peculiar to the commercial law; for, as long as the debtor is in possession of his property, and until a surrender, he retains the power, and it becomes his duty, to sell and reduce it to money, for the purpose of discharging his debts..... *ib.*

9. A *bonâ fide* purchaser of property from a failing debtor is in no danger of being disquieted in his title, or possession, when no other ground of suspicion exists but the protest of his vendor's notes..... *ib.*

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10. A commander of a steam-boat, who speculates in the purchase and sale of sugar, cotton, and salt, which he furnishes to planters and others at their request, and keeps no books but those of the boat, will not be considered a merchant or trader, in the technical or legal sense of the term, and is dispensed from producing his books in court, when appplying for the benefit of the insolvent laws.....*Wright* vs. *His Creditors*, 308

11. A sale by a debtor on the eve of insolvency, of shares in a steam-boat, will not be deemed in fraud of creditors. when by the evidence it appears to have been made for cash..... *ib.*

INSURANCE.

1. The underwriter has an undoubted right to be informed of every circumstance tending to create or increase the risk, against which insurance is sought, and which, if disclosed, might induce the insurer to decline or demand a higher premium.....*Walden* vs. *Louisiana Insurance Company*, 134

2. So, where the plaintiff was induced by the rumour of an attempt to set fire to an adjacent rope walk, to insure his house against fire, and withheld this circumstance from the underwriters: *Held*, that he could not recover. *ib.*

3. Parole evidence is inadmissible to show, that a corporation as an insurance company, in its corporate capacity, undertook a risk for which it is legally liable. *Courtnay et al.* vs. *Mississippi Marine and Fire Ins. Company*, 233

4. The president of an insurance company, cannot be considered as acting within the scope of his official authority, in relation to an insurance, unless his act is evidenced by his signature..... *ib.*

5. So, where a policy of insurance was taken out on one hundred and forty-three hogsheads of sugar, from New-Orleans to Louisville, in the steamer Belfast, and only twenty-six were taken the first trip; the remaining one hundred and seventeen were shipped on the second trip of the boat, without any endorsement on the policy or new written agreement, and the boat and cargo was lost by fire; *Held*, that the insurers were not liable, the policy not extending to the second trip..... *ib.*

6. Under the averments, "that the goods to the amount mentioned in the policy of insurance, were not lost, and that the insurer suspected and had reason to suspect, that the pretended loss was altogether fraudulent, evidence will be received to prove that the plaintiff had *not* the goods when the loss occurred, and that it was fraudulent.

Brugnot vs. *Louisiana State Marine and Fire Insurance Company*, 326

7. Where the claim for indemnity against loss by fire, is resisted by a charge of an attempt by the claimant to defraud the underwriters in setting fire to his own store, and claiming losses on goods which never happened; such fraudulent *intent must be shown*; but it may appear by presumptive as

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well as direct evidence; and when once established, no recovery can be had.
Regnier vs. *Louisiana State Marine and Fire Insurance Company*, 336

8. So, where the statement of losses sworn to by the claimant is disproved by witnesses, he is precluded on that ground from a recovery against the underwriters..... *ib.*

9. Presumptive and circumstantial evidence in a case may be insufficient to convict in a criminal prosecution for arson, and yet strong enough to prevent a recovery on a policy of insurance, when the claimant is charged with attempting to defraud the underwriters..... *ib.*

10. There is no breach of the warranty on the part of the insured, which declares, "that no loss in consequence of *seizure or detention* for, or on account of illicit trade, is to be paid," where bullion was shipped from a port of Mexico, which is not prohibited by law, and the master of the vessel threw it overboard into shallow water, to avoid being lost in the wreck of the vessel. The underwriters are liable for the loss.
Kohn et al. vs. *New-Orleans Insurance Company*, 348

11. It is not enough to prove that there exists a general law, prohibiting the exportation of bullion from Mexico, to exonerate the underwriters who are supposed to be acquainted with the regulations of trade, and to have assumed all risks, except that of actual *seizure or detention* on account of illicit trade..... *ib.*

12. A vessel which proceeds on her voyage, and is prevented from entering her port of destination, by a blockading squadron, which requires her to put back to the port of departure, sustains a loss by a peril insured against, under the clause in the policy, insuring against "the arrests, restraints and detainments of kings, &c." and for which the insurers are liable.
Vigers et al. vs. *Ocean Insurance Company*, 362

13. Where the *vis major*, or blockading force, applies so directly and effectually as to break up the voyage, it is a restraint within the terms of the policy, although not attended by any actual seizure or arrest..... *ib.*

14. So, where insurance was upon merchandize in a schooner, bound from New-Orleans to Tampico, against the usual sea risks, and against "arrests, restraints and detainment of all kings, princes, and people, of whatever nation, &c.;" and on her arrival off the bar of Tampico, she was ordered away by the officers of the French blockading squadron, and compelled to return; *Held*, that the insurers were liable, and that the insured had the right to abandon and recover as for a total loss..... *ib.*

INTEREST.

1. In the absence of proof of a foreign law concerning interest, the court will be governed by the law of Louisiana, in allowing interest.
Mason vs. *Mason's Widow and Heirs*, 589

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2. Interest is considered in lieu of fruits, and it forms a part of the *price*, for which the vendor has his privilege, as well as for the principal sum. *Mason* vs. *Mason's Widow and Heirs*, 569

3. Interest arising *ex morâ* is in the nature of damages, for the non-performance of a contract to pay money, and it is presumed to have been in the contemplation of the parties at the time of contracting; it must, therefore, be governed by the law in force at that time, which cannot be varied by any subsequent change in the law..... .....*White* vs. *M'Quillan*, 530

4. So where a law was passed, allowing interest at eight per cent., on promissory notes; *Held*, that it did not apply to notes executed before its passage, although not paid, and some of them not due at the time of its passage..... *ib.*

JUDGMENT.

1. An action of nullity to set aside the judgment homologating a curator's account, will be sustained, when the account is shown to be palpably fraudulent, as respects a particular item in it... ...*Fox* vs. *Bonner's Curator*, 406

2. A definitive judgment may be annulled in all cases, when it is shown to have been obtained through the fraud and ill practices of the party obtaining it..... *ib.*

3. Where a judgment was rendered by the court of the first judicial district, and its execution *is sought* by resorting to the *executory process* in the Parish Court of New-Orleans, having concurrent jurisdiction; *Held*, that it is without power to grant an order of seizure and sale, as *it* and the *District Court* possess the same jurisdiction, within the same territorial limits. *Canal Bank et al.* vs. *Copeland*, 34

4. Where a judgment is taken and confirmed by default, although it expresses on its face, *that due proof of the demand was made*, and the clerk and judge's certificates state, that the record contains *all the evidence adduced on the trial*, yet if the evidence in the record is insufficient, a judgment of nonsuit will be entered.....*Abbott et al.* vs. *Bell*, 132

5. A judgment without the reasons upon which it is rendered, *is* at least *voidable*. The constitution requires also a reference to the law on which it is founded, when it is *possible*, and when it does not appear the presumption arises that it was not possible to give it. *Hutchiss, Tutor, etc.* vs. *Dodd et al.* 142

6. It cannot be *presumed*, that a judge was ignorant of the grounds on which he rendered judgment, and the constitution requires them in every case..... *ib.*

7. So, where a judgment was unconstitutional and void, for want of reasons, and the judgment below rendered without evidence, or the evidence failed to come up with the record; *Held*, that the Supreme Court in such cases, cannot pronounce the judgment which should have been given below, but will remand the cause for further proceedings..... *ib.*

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8. The signature of the judge is only required to final judgments, and not to interlocutory ones, although they be appealable.
Van Winckle vs. *Flecheaux*, 148

9. The plaintiff may have his judgment altered contradictorily with the defendant, from a judgment with mortgage, &c., to a general judgment *without* mortgage..... .....*Freeland* vs. *Hodge*, 177

10. Where there was no question of law, and the verdict and judgment being, in the opinion of both courts, supported by the evidence, the judgment was affirmed with costs.....*Penn* vs. *Webber*, 223

11. The plaintiff has the absolute right to have his judgment by default confirmed on the fourth day after it is taken, without the defendant having any right to set it aside, and file an answer.....*Winchester* vs. *Rightor*, 255

12. Where the conclusions of the jury rest on facts, and the testimony is not so opposed to the verdict as to require a change, the judgment of the court below will be affirmed.....*Wallace, etc.* vs. *Beauchamp et al.*, 284

13. An action merely to annul a judgment, must be brought in the court which pronounced it. But where the party sues to annul, not merely a judgment of partition, but the partition itself, on the grounds of fraud and collusion, in order to reach the property, the cognizance of such an action belongs to the ordinary jurisdiction, and the action must be brought in the District Court..... .....*Clarke* vs. *Christine et al.*, 394

14. Where the appeal appears to be taken solely for delay, the judgment will be affirmed with such damages as the court, in its discretion, may decree, not exceeding ten per cent.....*Gibson* vs. *Gill*, 420

15. Where an appeal is evidently taken for delay, and the judgment appealed from carries no interest, it will be affirmed with the maximum of damages allowed by law.. .....*Norment, Curator etc.* vs. *Gill et ux.*, 422

16. So, judgment was affirmed with five per cent. damages, when it carried five per cent. interest.....*Vawter* vs. *Gill et al.*, 423

17. Judgment *nisi* on bail bonds, need not be signed by the judge, in order that copies be served as notices on the parties. The judge's signature is only required to final judgments.....*State, etc.* vs. *Johnson et al.*, 547

18. Where a judgment *nisi* is directed by law, to be made final at the succeeding term, and the court fails, it may be done at the following term. The law in this respect is considered as merely directory..... *ib.*

19. On a motion to make a judgment final, the proceedings are summary, and no particular day need be assigned for trial..... *ib.*

20. When an act creating an offence, is repealed, even after judgment in the inferior court, the judgment must be reversed if it has not been affirmed before the repeal. It is otherwise when the remedy only is changed by a new law..... *ib.*

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21. Notices of judgment, should be served in the same manner as in serving petitions and citations in the first instance,.....*Brown* vs. *Trent*, 600

22. After judgment by default, it is too late to plead an exception to the plaintiff's capacity to sue. Judgment by default is equivalent to issue joined.....*Reynolds's Tutor* vs. *Reynolds's Administrator*, 617

JURISDICTION.

1. A judgment creditor, may demand the execution of a judgment rendered in a different court from the one to which he applies for the executory process; but this process cannot issue from a court of concurrent jurisdiction, *within the same* territorial limits, as to its jurisdiction. The party must resort to his *fieri facias*, on his judgment.

Canal Bank et al. vs. *Copeland*, 34

2. The legislature cannot vest the power in the Supreme Court, to suspend notaries in office for mal-practices, because the court would then be exercising original jurisdiction, when the constitution expressly provides, that its jurisdiction shall be *appellate only*.

Robouam's Heirs vs. *Robouam's Executor*, 73

3. The ordinary or general jurisdiction, should not be *restricted*, except by the unequivocal will of the legislature.....*Henry* vs. *Keys et ux.*, 214

4. The District Court, is not without jurisdiction *ratione materiæ*, in an action of partition, between co-heirs and joint owners of immoveable property of full age, inherited from a deceased sister..... *ib.*

5. The District, and not Probate Courts, have jurisdiction of actions, to annul judgments of partition, on the ground of fraud and collusion, and reach the property.....*Clark* vs. *Christine et al.*, 394

6. The district judge has jurisdiction for the appointment of notaries and other persons to take inventories, &c. of successions, where the parish or probate judge is disqualified from interest, or other causes, from acting.

State vs. *Judge Buchanan*, 409

JURY.

1. Where the conclusions of the jury rest on matters of fact, and the testimony is not so opposed to the verdict as to require a change, the judgment thereon will be affirmed.....*Wallace etc.* vs. *Beauchamp et al.*, 264

2. When the evidence leaves it doubtful, whether the parties understood each other as to the transfer of a certain account, charging the defendant's firm with it, the jury is the proper tribunal to decide upon the whole matter.....*ib.* 289

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3. Where it appears by the verdict of the jury, on examination of the evidence, that substantial justice has been done, judgment will not be disturbed,.....*Elam* vs. *Morgan et ux.*, 319

4. The verdict of the jury, rendered on doubtful evidence, and the effect of presumptions arising from circumstances in a case, will not be disturbed. *Williams, etc.* vs. *Warfield*, 392

5. Where it appears, that the verdict of the jury is not based on any assignable cause of action, or supported by any testimony found in the record, it will be set aside.....*Gill, etc.* vs. *Reneau*, 399

6. Either party has the right to pray for a jury at any time before the cause is set for trial; and this right cannot be denied, even when it is clear it is intended for delay.....*Reynolds's Curator* vs. *Mahle*, 424

7. A challenge to the array, on the ground that the jurors were irregularly drawn, will be disregarded, and the trial proceeded in, when it does not appear there was any *material* irregularity in drawing them. *Pratt* vs. *Grappe*, 451

8. The mere fact that the clerk, while writing down the list, requested the sheriff to draw the names of the jurors from the box, does not vitiate the array so as to set aside the panel..... *ib.*

9. The jury are to be guided by the evidence before them, but cannot inquire into the correctness of the judge, in rejecting or admitting particular evidence.....*Hogan* vs. *Gibson*, 457

LAND.

1. Land situated and lying below high water mark, is not susceptible of private ownership.....*Milne* vs. *Girodeau*, 324

2. So, the plaintiff in a petitory action, who sues to recover land, lying below high water mark, and forming part of the bed of the lake, cannot recover as owner in his own right..... *ib.*

3. The act of congress, passed in 1832, allowing front proprietors a preference in becoming the purchasers of back concessions of land, gives to the front owner, from the time of its passage, an inchoate right, which will enable him to maintain an action for damages, for waste committed on the land, before entry and purchase by him.....*Terrill* vs. *Chambers*, 578

LAWS.

1. All laws before they become obligatory *must be known*, and be promulgated by the Governor.....*Cheyron's Heirs* vs. *Attorney General*, 315

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2. So, a law which is promulgated by the Secretary of State, in pursuance of a resolution of the two branches of the legislature, which never received the approbation of the Governor is *not obligatory*..... *ib.*

3. It is a sound principle of construction never to consider laws as applying to cases which arose previous to their passage, unless the legislature declared such to be their intention.....*State* vs. *Judge Bermudez*, 352

4. The legislature has no right, perhaps, to add to the obligations or responsibilities which flow from a contract at the time it is made, or to abridge any of the rights which it conferred..... ..... *ib.*

5. So, acquired rights and existing contracts cannot be affected by subsequent legislation; but in relation to remedies, forms of proceedings and limitation of actions, a different principle applies, and the legislature may modify them..... ..... *ib.*

6. The monition law of 1834 is a remedial statute, intended to prevent the mass of litigation growing out of alleged informalities and nullities of judicial sales, which gives to all purchasers at judicial sales, the right to invoke its provisions; and it applies as well to sales made before, as since its passage..... .... *ib.*

7. When there is no evidence in the record, of the laws of the State, where the transaction or contract in question was made, it will be decided according to the laws of this State.....*Harris* vs. *Allnutt et al.*, 465

8. Where the answers to facts and articles, touching the law of another State in relation to interest, show that there is a statute law on the subject, the statute itself must be produced.....*Mason* vs. *Mason's Widow and Heirs*, 589

9. In the absence of legal proof of a foreign law, the court will be governed by the laws of this State..... *ib.*

10. The object of the monition act of 1834, is merely to provoke an inquiry into the legality of the proceedings, which preceded or accompanied judicial sales; and the homologation of such sales has no other effect than to cure all nullities resulting from any informality in making the sale. *Pannell's Heirs* vs. *Overton*, 555

LITIGIOUS RIGHTS.

1. The law recognizes the sale of litigious rights, and courts have no power to prevent it..... .....*Seymour* vs. *Bourgeat et al.*, 123

2. The sheriff's sale, under execution, of a judgment pending on a devolutive appeal, is not the sale of a litigious right, which is forbidden by law. The code, article 2622, speaks of conventional transfers and sales and not an adjudication by a public officer.....*Early* vs. *Black*, 205

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3. The article 2624, No. 2 of the Louisiana Code, authorizes the transfer of a litigious right from a debtor to his creditor, and it is excepted from the operation of article 2622..... *ib.*

LEASE.

1. The law does not require the lessors to demand payment of the rent on the very day it becomes due, in order to place the lessees *in morâ*, so as to obtain a dissolution of the lease in case of non-payment of the rent.
Hyde et al. vs. *Palmer & Southmayd*, 359

2. So, it is not necessary that demand of the rent should be made by or in the name of all the members of a commercial firm, to whom the lease is given. It may be made by either of the members..... *ib.*

3. Where the owner of a tract of land gave permission to make a race course on it, saying to the plaintiffs "they might have the land ten years for nothing," or "as long as they pleased;" but it does not appear that the owner was to derive any benefit from the improvements put on it: *Held*, that there was no lease, and the heirs of the late owner are entitled to the possession under their inheritance.....*Paige, &c.* vs. *Scott's Heirs*, 490

4. It is of the essence of the contract of lease that a rent, or an equivalent, should be stated..... *ib.*

LOTTERY.

1. The church wardens of the Catholic congregation of St. Francis were authorized to raise the sum of twenty thousand dollars by lottery, and to draw as many as three classes, with the right to sell their privileges, which they did, to a third person, who also sold his rights and privileges to F., who drew as many as 20 classes: *Held*, that there was no privity between the church wardens and F., and they were not liable for the payment of the prizes drawn under his management.....*Walton* vs. *Catholic Congregation*, 493

MANDAMUS.

1. A mandamus will not lie to the District Court, commanding him to take jurisdiction, and try a cause which he has sent to the Probate Court on a plea to his jurisdiction.....*State* vs. *Judge Morgan*, 118

MARITAL PORTION.

1. Where the widow receives her share of the community property, and a sum of money in lieu of dower, and the disproportion between these sums and the amount to be divided among three children, does not authorize the

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court to say she is in necessitous circumstances, she will not be allowed a marital portion.....*Mason* vs. *Mason's Widow and Heirs*, 589

MINORS.

1. Emancipated minors are not exempted from arrest for debts legally contracted by them *after* their emancipation.
Merchants' Insurance Company vs. *Barroso*, 411

2. Where the testimony leaves the question of minority doubtful, and justice requires it, the case will be remanded..... *ib.*

MONITION LAW.—SEE LAWS.

MORTGAGE.

1. Where the vendors of a steam-boat take a bill of exchange for the price, reserving their privilege and mortgage on the boat to secure payment, and the bill is not paid, through the neglect of the holders in not using due diligence, the mortgage, which is but an accessory to the debt, is extinguished with it.....*Fulton Company* vs. *Wright et al.*, 336

MUNICIPAL LAW.

1. According to the terms of the compromise between the city of New-Orleans, the front proprietors, and private claimants of the batture, dated the 20th September, 1820, the entire batture and open space between New Levee-street and the river, in front of faubourg St. Mary, is dedicated to public uses, and those to which it is naturally destined as a part of the port of New-Orleans.....*Municipality No.* 1 vs. *Municipality No.* 2, 49

2. The administration of this public place, and the batture on it, is confided exclusively to the Second Municipality, whose duty it is to administer it in such a manner as to promote the important purpose for which it was dedicated, and not to impede any right to the use of it to the citizens generally..... *ib.*

3. The right to take earth and sand from this batture is not a corporate right, but one common to every inhabitant of the city. The use of this right is to be so regulated, as not to defeat other great objects of the dedication, as well as to protect all the citizens in an equal enjoyment of it..... *ib.*

4. A perpetual injunction will not be granted by the court in a case where it is not demanded; and where the right to be secured is not a corporate one, but common to every inhabitant..... *ib.*

5. Nor will an injunction be maintained when the purpose of the suit is to restrain the action of the city council, when the right claimed is indefi-

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nite, and when such injunction might tend to limit a legitimate exercise of authority vested in the council. *Municipality No.* 1 vs. *Municipality No.* 2, 49

NEW TRIAL.

1. Where a party is surprised for want of a knowledge of his adversary's title, which, if disclosed, he could have defeated, he should show this by affidavit, as grounds for a new trial.....*Gravier's Curator* vs. *Rapp, f. w. c.*, 162

2. When a case turns mainly on questions of fact, and the court is unable to pronounce finally on some one of the pleas, it will be remanded for a new trial.....*Varion* vs. *Bell*, 334

3. The disappointment of a party in being deprived of the testimony he wanted, by the misconduct of a witness at the trial, presents good ground for a new trial.....*Leckie* vs. *Crain et al.*, 432

4. In this case the evidence being insufficient to decide on the merits, it was remanded for a new trial.....*Hood* vs. *M'Corkle*, 573

NOTARIES.

1. A charge of a round sum in a notary's account, for "inventory, copies, &c.," is illegal, and contrary to the tariff, even in succession matters, and should be disallowed.....*Robouam's Heirs* vs. *Robouam's Executor*, 73

2. The legislature cannot vest the power of suspending notaries in office, for mal-practices in this court, because it would then be exercising original jurisdiction, when the constitution expressly says its jurisdiction shall be appellate only..... *ib.*

PARTIES TO ACTIONS.—SEE ACTION.

PARTNERSHIP.

1. A partnership may sue on a contract for the sale and delivery of slaves, made by one of the partners, to the firm of which he is a member. *Forstall & Co.* vs. *Blanchard et al.*, 1

2. Where the petition charges the defendants as a *firm*, and it appears the transaction was a commercial one, they will be considered as liable *in solido*, and judgment rendered accordingly, without any express prayer to that effect.....*Chapman* vs. *Early et al.*, 230

3. When only one partner of a firm joins issue and appeals, this court cannot inquire whether the other one was legally cited or not, or whether a curator *ad hoc* ought to have been appointed to defend him..... *ib.*

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4. Creditors of a firm are entitled to be paid by preference out of the partnership effects, over creditors of an individual partner of the firm.
Gardiner et al. vs. *Smith*, 370

PAYMENT.

1. When two debts are not equally due and payable, the debtor is presumed to have the greatest interest to discharge that which is already due and payable, and for which he is liable to an immediate suit, in preference to one not due; and the creditor is bound to impute payment to that one, when nothing is said.....*Forstall & Co.* vs. *Blanchard et al.*, 1

2. So, a debtor is presumed to have a greater interest in discharging a mortgage than a chirographery debt, when both are equally due and payable; and imputation of payment must be made accordingly..... *ib.*

PRACTICE.

1. Where the petition is addressed to the District Court for the particular district in which suit is brought, it is sufficient, without naming it to be *in the State of Louisiana*..... *Lallande* vs. *Terrill*, 7

2. The Code of Practice does not require the defendant's name and surname, to appear at full length in the citation..... *ib.*

3. Amendments offering to set forth the true name of the defendant, when it is mistaken in the petition, ought to be permitted *instanter*..... *ib.*

4. Appearance, and filing exceptions by way of answer, are matters of right at any time before trial, on the tacit issue arising out of the judgment by default..... *ib.*

5. The defendant being sued on his note, denied his signature, and proof was made of it. On the trial he moved the court to instruct the jury, that as no evidence of title to the note was given, the plaintiff could not recover: *Held*, that he was prohibited from every other means of defence, after having formally denied his signature..... *Cochran* vs. *Perry*, 11

6. If the counsel for either party requests the court, when the evidence closes, and before the jury retires, to charge them in a particular way, and *it refuses*, a bill of exceptions may be tendered to such refusal, even after the jury returns with their verdict.....*State* vs. *Judge Buchanan* 203

7. It is sufficient if the judge refuses to charge the jury as required by a party, that the exception be taken when the charge is made. It may be drawn up, and submitted to the court, within a reasonable time thereafter, and before the judgment is signed..... *ib.*

8. Where goods were attached in the hands of a certain mercantile firm, which are claimed by an intervening creditor, who alleges they are in the

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possession of *a different firm*, he cannot offer evidence to show the goods actually attached are his, when the two houses are distinct, because the proof must conform to the allegation.....*Pritchard* vs. *M'Kinstry et al.* 224

9. In an action for the value of stolen goods, it should be fixed at their current selling price, and not the original cost of the goods.

Patterson vs. *Behan et al.*, 227

10. Where the petition alleges the defendants are trading under *a firm*, and it appears the transaction was a commercial one, they will be considered as liable *in solido*, and judgment given accordingly, without any express allegation or prayer for a judgment *in solido*.....*Chapman* vs. *Early et al.*, 230

11. The petition must contain the name and surname of the plaintiff: it is insufficient to give only the *initials* of the christian name.

Lee & Hardy vs. *Rice et al.*, 254

12. Where a judgment by default was taken on the second day of the term, and on the fourth thereafter, being the last, the defendant filed his answer setting the default aside: *Held*, that the plaintiff was entitled to have the cause set for trial the same day.....*Winchester* vs. *Rightor*, 255

13. Where the petition, claiming certain lots of ground, is silent on the subject of the defendant's buildings being a nuisance, the plaintiff cannot demand its abatement, and the removal of the buildings.

Milne vs. *Girodeau*, 324

14. Where the wife is a party plaintiff, and fails to produce the necessary proof of the authorization by her husband to sue, the court, when justice requires it, will remand the case for further proceedings.

Keys et al. vs. *Nettles*, 331

15. The plea of payment admits the debt once existed, but has been paid; and unless the defendant *proves* payment, it will be considered as still existing, and the plaintiff will have judgment.....*Jones* vs. *Bishop*, 397

16. Where the defendant pleads the general issue and payment, the pleas are contradictory and the latter will prevail..... *ib.*

17. If it appears from the record that the proceedings in a suit are altogether defective from the commencement, the petition will be dismissed.

Gill, &c. vs. *Reneau*, 399

18. If the answers of the plaintiffs to certain interrogatories of the defendants, on the order of court, were not called for by the interrogatories, they may be disregarded by the jury under instructions from the court.

Bailey, &c. vs. *Hickman*, 415

19. It was held, in a case where a supplemental petition of the heirs &c. of a deceased plaintiff was presented, after issue joined, that it was in the

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nature of a revival of the suit, rather than an amendment, and must be notified to the defendant by service of the new petition and citation.
Babcock, &c. vs. *Williams*, 428

20. But where a co-plaintiff died after issue joined, and an order was made contradictorily with the defendant to revive the suit in the name of the heirs, etc. of the deceased plaintiff: *Held*, that no service of amended petition or citation was necessary; or even judgment by default, in order to proceed to final judgment..... *ib.*

21. Where a decision on a point of practice is known and made public, no delay will be allowed the party to avail himself of it at the trial of the appeal.....*Cuny* vs. *Robert et al.*, 474

22. Where the petition alleged "that at the proper time, due and legal demand was made of payment of the note at the proper place and payment refused"—the note being annexed to the petition as part of it, it was deemed a sufficient allegation to let in proof of demand.
Laferrière vs. *Bynum et al.*, 587

23. It is sufficient to allege "that due and lawful demand of payment was made without effect," with the note and protest annexed and made part of the petition, to let in proof of demand.....*Laferrière* vs. *Wells*, 588

24. Where an intervening party admits in his petition or answer, the material facts alleged by the adverse party, he will not be allowed to amend and deny the facts admitted, so as to put the adverse party to the proof of them.
Mason vs. *Mason's Widow and Heirs*, 589

PRESCRIPTION.

1. In the case of Guillet vs. Erwin, 7 Louisiana Reports, 580, if it had been urged that prescription would have been interrupted by the appointment of a curator *ad hoc* to the defendant, the plea of prescription in that case might probably have been supported.....*George* vs. *Fitz Gerald*, 604

2. If, after prescription has run, the maker of a note in a letter to the holder, acknowledges the existence of the debt, but says a prolongation of the time of payment had been allowed him, it will take the case out of prescription.....*Shiff* vs. *Hertzogg*, 455

3. Prescription is interrupted when the possessor is cited on account of the property or the possession; and the same rule applies to the prescription *liberandi causâ*. It is interrupted although the tribunal be without jurisdiction.....*White* vs. *M'Quillan*, 530

4. The citation of a debtor, by service of the citation, together with a copy of the petition, although it may appear that the copy was not duly certified by the clerk, is a sufficient judicial demand to interrupt prescription. *ib.*

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PRISON LIMITS.

1. Where the prison limits are established by the police jury, and afterwards a portion of the parish is added to another by law, including a part of the prison limits: *Held*, that this change did not restrict the limits or abrogate the ordinance fixing them, and that a debtor in the limits was entitled to the same boundary.....*Olden* vs. *Alexander*, 156

PRIVILEGE.

1. The recording of the adjudication of work to be done on levees and roads, creates a privilege for the price of the work, on the land, which follows it into whosesoever hands it may come; but the third possessor is entitled to full notice of the proceedings against the property, that he may retain it, by paying off the incumbrance.....*De Verbois* vs. *Navy et al.*, 248

2. Freighters, or shippers, have a privilege on the vessel for the amount of damages occasioned the goods, by the failure to deliver them, through the default of the captain.....*Stinson et al.* vs. *Schooner Pennsylvania*, 332

PUBLIC WORKS.

1. The act of the 8th of February, 1831, section 5, requires the *procés verbal* of adjudications of work to be done to levees, roads, &c., to be recorded by the parish judge, which shall operate as a lien on the land over which the levee or road is made, and, in case of non-payment by the owner, an order of seizure and sale shall be granted by the parish judge, whatever may be the amount due, &c.; but the parish judge has no jurisdiction of an ordinary suit for the payment of a privileged claim of this kind over three hundred dollars.....*De Verbois* vs. *Navy et al.*, 247

2. The recording of the adjudication of work to be done on levees and roads, creates a privilege for the price on the land, into whatever hands it may come; but the third possessor is entitled to full notice of the proceedings against the land, that he may have an opportunity to retain it by paying off the incumbrance..... *ib.*

RECONVENTION.

1. The demand of the plaintiff, and the plea in reconvention, should be determined by one and the same judgment; so, where the plaintiff dies after a reconventional demand is put in by the defendant, the case will not be transferred on that account to the Probate Court, but may be acted upon, partly as compensation in reducing the plaintiff's claim, and partly as a judgment in reconvention.....*Bailey* vs. *Smith*, 506

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REDHIBITION.

1. Drunkenness in a slave is a vice of character, which, under the provisions of the Louisiana Code, is not redhibitory, so as to give rise to the redhibitory action.....*Behan et al.* vs. *Faures*, 211

2. So, viciousness and madness, resulting as a consequence from drunkenness, in a slave, will not sustain the redhibitory action..... *ib.*

3. According to the provisions of the act of 2nd January, 1834, redhibitory, bodily or mental vices and maladies, which discover themselves within fifteen days after the sale of slaves recently brought into the state, are presumed to have existed on the day of sale, and give rise to the redhibitory action.....*Mulhollan* vs. *Huie*, 241

4. So, where a slave was taken sick within twelve days after the sale, and died, and the proof rather tended to show that the disease existed before or at the sale: *Held*, that the seller is bound to restore the *price* to the buyer.. *ib.*

SALARY.

1. Where a person is employed by the year, he cannot quit the service of his employer, without forfeiting his salary; nor can he be dismissed *ad libitum*, and thereby deprived of it.

Beckman vs. *New-Orleans Cotton Press Company*, 67

2. So, where the plaintiff was employed by the year, at a fixed salary, to superintend the defendant's cotton press, and, after his year had commenced, he was dismissed, because he refused to submit to a diminution of his salary: *Held*, that he was entitled to recover the amount of it for the entire year..... *ib.*

SALE.

1. A sale of slaves, the consideration of which is a sum acknowledged at the time, to be owing by the vendors to the vendees, and stipulated to be paid on a particular day, and, on failure, the sale to become absolute, otherwise it is null and void: *Held*, that this is a valid sale, and becomes absolute on the failure of the vendors to pay the sum due the vendees, on the day stipulated.....*Forstall & Co.* vs. *Blanchard et al.*, 1

2. The purchaser at probate sale cannot retain the amount of his notes, in discharge of a legacy from the decedent to his minor children, on the ground that he is entitled to receive it for them, and has the usufruct during his marriage with their mother. His debt to the estate is personal, and his claim to the legacy *in autre droit*.....*Gorton* vs. *Gorton's Executor*, 476

3. In a sale of a tract of land, described in the instrument of writing as having certain boundaries, but making express reference to a plat of survey,

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"being four quarter sections, as surveyed by M. L.," the reference to the plat of survey must control the vague and indefinite description of the boundaries in other clauses of the contract.....*Millikin* vs. *Minnis*, 539

SEQUESTRATION.

1. Where the defendant was sued to deliver the possession of a gang of slaves, and they are sequestered, he will not be allowed to select a portion and bond them, leaving the rest in the hands of the officer.

Taylor vs. *Penrose et al.*, 137

2. The defendant should be permitted to offer evidence of the allegations upon which he grounds his motion to set aside an order of sequestration; especially when the facts offered to be disproved formed an inducement for granting the order.....*Van Winckle* vs. *Flecheaux*, 148

SERVITUDE.

1. Where two estates are situated adjacent to each other, the one below owes to the other a natural servitude, to receive the waters which run naturally from it, provided the industry of man has not been used to create that servitude.....*Martin* vs. *Jett*, 501

2. The owner of the superior estate cannot make on his own land any works which would change the natural passage of the water upon the one below owing the servitude, by collecting it upon a single point, and giving it thereby a more rapid current, etc..... *ib.*

3. But the owner of the superior estate may, nevertheless, make any work useful and necessary to agriculture, as furrows in a field, or even ditches; not for the purpose of making the water flow upon the adjacent land, but for the purpose of improving and cultivating his land, and making it more healthy. He is not, however, to ameliorate his own land to the injury of his neighbor..... *ib.*

SHERIFF.

1. The sheriff cannot be compelled to amend his return. So the court will not require him on a rule, to show cause to amend, and state at whose instance he served certain notices of judgment.

Gravier's Curator vs. *Carraby's Executor*, 127

SLAVES.

1. In this case it is decided, that none of the slaves mentioned in the will of the late Julien Poydras, have the right to be emancipated, until twenty-five years after the sale of his estate, even if they have attained their sixtieth year; and that no slave having arrived at this age can claim his stipend of twenty-five dollars per annum, and exemption from labor, until he be emancipated.....*Poulard, c. p., et al.* vs. *Delamare et al.*, 267

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SURETIES IN BAIL BONDS—SEE BAIL.

SURETY.

1. The surety in an injunction bond, is a competent surety in the appeal bond in the same suit, unless he has been condemned by the judgment appealed from, as a party under the act of 1831....*Leeds* vs. *Yeatman et al.*, 383

2. When the surety in an injunction, is not before the court on an appeal, no judgment for interest or damages, can be pronounced against him on dissolving the injunction.....*Spurlock* vs. *Hunter's Heirs*, 564

TITLE.

1. Where the expressions in the title convey three arpents front, with the depth of eighty, the purchaser cannot claim by diverging lines to the rear, under the pretext that he purchased the *residue* of a plantation, and thereby obtain more than a superfices of two hundred and forty arpents in the form of a parallelogram.....*Borgeat* vs. *Borgeat*, 139

2. The titles of the parties, and not the manner of putting in possession, or the acquiescence of one in the possession of the other, for a time will control, when the pretensions set up under the possession, are wholly inconsistent with the written titles.....*Millikin* vs. *Minnis*, 539

VENDOR AND VENDEE.

1. If a purchaser suffer suit and eviction, without calling the original parties, from whom he derived title, in warranty to defend, he cannot avail himself of the eviction to withhold payment of the original price; especially if it appears his vendor had the means of defending his title and possession; or that the party evicting him had been enabled by the defendant's *laches* to perfect his title..... ...*Mayer's Heirs* vs. *Neraut's Administrator*, 30

2. So, if a purchaser fails to avail himself of all the rights acquired by his purchase from his vendor, or those from whom he derives his title, it is his own fault and imputable to his own *laches*..... *ib.*

3. The vendor has the right to institute suit on each instalment of the price as it becomes due. The pendency of another suit for a different instalment, in the United States District Court, sitting in the state, will be no bar to the action..... .....*Hampton's Heirs* vs. *Barrett*, 159

4. If the vendor sells without title at the time of sale, but acquires it afterwards, it will accrue to the benefit of his vendee.

Stokes vs. *Shackleford et al.*, 170

WARRANTY.

1. The heir cannot claim against the warranty of his ancestor, but is estopped by it from asserting title, although the title never vested until after the ancestor's death..... ..... *ib.*

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2. The obligation of warranty descends to the heir of the vendor, and one of its first objects is the buyer's peaceable possession of the thing sold. In this respect the obligation is indivisible, although in regard to damages consequent on eviction, each heir may only be bound for his verile share.

Stokes vs. *Shakleford et al.* 170

3. The warranty of the vendor does not extend to the payment of interest on the *price* of a slave, when eviction takes place, and when he is required to refund the price to his vendee. *Conolly et al.* vs. *Bertrand, f. m. c.*, 313

4. Where the purchaser of a tract of land sells, during the pendency of a suit, to evict him, without recourse in warranty, and divests himself of all title before the final judgment of eviction, *he is without* interest, and cannot claim from his vendor a diminution of the price, which he contracted to pay.....*Spurlock* vs. *Hunter's Heirs*, 564

WILL.

1. Two wills made at different times may stand together in all the parts in which they are not inconsistent. But where they conflict, the provisions in the last one will prevail.....*Tournoir* vs. *Tournoir et al.*, 19

2. The law declares all *fidei commissa* null, even those in favor of persons capable of receiving legacies by will..... *ib.*

3. Where the testator requested and obtained the promise of another to convey a certain part of his estate, immediately after his death, to *a third person as a legacy*, this is not a substitution but a *fidei commissum;* i. e., a trust in the good faith of the person interposed, that he will convey the property to the person designated..... *ib.*

4. The grandfather of a legatee in a will, is a competent witness to attest and make proof of it.....*Segur's Heirs* vs. *Segur et al.*, 25

5. Witnesses to a will, must possess the qualifications specified for testaments by public act, and for notarial acts in general, but it does not follow that they must be competent as judicial witnesses in any controversy growing out of a will..... *ib.*

6. The notary may make a memorandum of the dictations of the testator, and write out the will from it; and if it is all done in the presence of the witnesses, and without turning aside to other matters, it is sufficient to give validity to the will..... *ib.*

7. Where there were two wills, and in the first a legacy of five hundred dollars each, was given to two brothers, with a proviso, that if only one of the legatees survived the testator, he should have both legacies; and in the last will this proviso was omitted: *Held*, that it is left doubtful whether a double legacy was bequeathed or intended, and in case of doubt, the lesser quantity only will be taken as the amount of the legacies.

Robouam's Heirs vs. *Robouam's Executor*, 73

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8. A nuncupative will, to be valid, must be dictated and written by the notary as dictated, in the presence of three witnesses residing in the place, etc., and then read to the testator, by the notary, in the presence of all the witnesses.....*Langley's Heirs* vs. *Langley's Executors*, 114

9. So where one of the witnesses was not present when the will was dictated, but it was read to the testator by the notary in the presence of all the witnesses, and they all signed with the testator and notary: *Held*, that the will is null for want of the legal formalities..... *ib.*

10. The declaration made by the notary in a will "that it was written as dictated by the testator," may as well precede the dispositions, as follow them at the close of the instrument. Either would be sufficient.

Stafford vs. *Stafford et al.*, 439

11. It is sufficient for the validity of a will, that it is signed by another person for the testator in his presence, and that of the witnesses, if it is declared that the testator is unable to sign from any physical cause, as rheumatism, debility by sickness, etc. The disability may be declared by the notary, without a declaration from the testator..... *ib.*

12. The general provision of law is, that "nuncupative wills under private signature," must be attested by five witnesses residing in the place, or seven residing elsewhere; but there is an exception in regard to this form of wills made in the country, that three witnesses residing in the place, or five elsewhere, will suffice; provided, that in this case, a greater number cannot be had.....*Baillo et al.* vs. *Innis's Executors*, 483

13. It must be shown, that a greater number than three witnesses cannot be had; or if it appear that a greater number might have been had to a nuncupative will under private signature, made in the country, it will be anuulled for want of the requisite number of witnesses..... *ib.*

WITNESS.

1. The grandfather of a legatee is a competent witness to attest the will in which the legacy is contained.....*Segur's Heirs* vs. *Segur et al.*, 25

2. Witnesses to a will are only required to possess the qualifications of witnesses to notarial acts generally. It does not follow that they must be competent as judicial witnesses in any controversy growing out of a will.... *ib.*

3. The plaintiff's debtor is a competent witness in a suit between him and the defendant, who is sued on his promissory note, when it appears the witness's private account was contracted before the execution of the note sued on, even when the defendant is charged with it, by a transfer of the plaintiff, made afterwards.....*Wallace, etc.*, vs. *Beauchamp et al.*, 289

4. The absence of a witness from the court house, but who is in town, and not in a situation to testify at the time he is called, furnishes sufficient ground to postpone the trial until the next day, without any further showing by the party wanting his testimony.....*Leckie* vs. *Crain et al.*, 432